

COMMERCE, JUSTICE, SCIENCE, AND RELATED
AGENCIES APPROPRIATIONS FOR 2013

HEARINGS
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON APPROPRIATIONS
HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
SECOND SESSION

SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED
AGENCIES

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COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS FOR 2013

TUESDAY, FEBRUARY 28, 2012.

U.S. DEPARTMENT OF JUSTICE

WITNESS

HON. ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES

OPENING STATEMENT—MR. WOLF

Mr. WOLF. The hearing will come to order.

Attorney General Holder, we want to welcome you to the committee and thank you for your appearance today. You are testifying today on your fiscal year 2013 budget request. Independent of rescissions and scorekeeping adjustments, you are seeking new discretionary budget authority of \$27.1 billion, an increase of \$53 million or 0.2 percent above the fiscal year 2012. So it is a very tight budget, and we appreciate that.

Your budget request for fiscal year 2013 is in large part driven by growing requirements in the detention and incarceration accounts. You are requesting increases of \$365 million just to provide the necessary capacity for Federal prisoners and the secure housing of detainees in the custody of the U.S. Marshals. We will have some questions as well on the national security programs, your gang and drug enforcement efforts, and about your efforts to provide meaningful work opportunities for the Nation's inmates, but to provide them in ways that do not take jobs away from American workers.

We hope to discuss with you also the implementation of anti-trafficking activities and your oversight of the implementation of the long-awaited regulations designed to put an end to prison rape. The bill passed in 2003, so we hope we can kind of put that to bed quickly.

Before I recognize you to present your testimony, I would like recognize my colleague, Ranking Minority Member, Mr. Fattah for any comments, and then we will go directly to the full committee Chairman, Mr. Rogers.

Mr. Fattah.

OPENING STATEMENT—MR. FATTAH

Mr. FATTAH. Thank you, Mr. Chairman.

Let me say at the outset that we begin now this year's work on the fiscal year 2013 budget, and I don't believe that there was a circumstance last year in which in any subcommittee there was a better working relationship than that I had as the ranking member with Chairman Wolf. So I look forward to the opportunity again to work with you this year as we deal with these challenges, and I thank you for all the courtesies that were extended last year.

Mr. WOLF. Thank you, Mr. Fattah.

I would now like to recognize Mr. Rogers, who was chairman of this subcommittee for six years a good while back and understands the working of the committee.

Mr. Rogers.

OPENING STATEMENT—MR. ROGERS

Mr. ROGERS. Thank you, Mr. Chairman.

General, welcome again.

As you are no doubt aware, this committee, the Appropriations full committee, has been front and center in attempting to address the very real security threat posed by out-of-control Washington spending and trillion dollar deficits now four years in the running.

Last year, last calendar year, we worked and passed two years of appropriations bills, for fiscal 2011 and fiscal 2012 as well, all in one year. We have not done that and cut spending as we did since World War II. And we were working to restore transparency to this process, austerity and tough oversight to the appropriations process. It had been missing for some time.

As I have mentioned to Secretaries Napolitano and Panetta, where our Federal law enforcement, intelligence officers, and military men and women are concerned, you must be best at prioritizing the mission and making scarce dollars count. The fiscal 2013 request that you sent us is essentially level with fiscal 2012. Federal law enforcement accounts are more or less frozen. Understanding the difficult budgetary constraints under which you are operating, particularly the rapidly escalating costs within our Federal Prison System, I look forward to hearing your testimony about the impacts of that flat funding to the operational capabilities of our law enforcement officials on the front lines.

In addition, I am concerned about a number of budgeting gimmicks which undermine the integrity of the request. For example, the Bureau of Prisons budget is relying on the enactment of authorizing legislation outside our jurisdiction to achieve \$41 million in savings. That same language was requested but not included in fiscal year 2012.

You have also continued to rely on rescissions to finance your discretionary budget, including some \$280 million from core law enforcement accounts. With a drug war raging on our borders, the abuse of prescription medications wreaking havoc in communities large and small, terrorists abroad, extremists in our own backyard threatening our way of life, I question the wisdom in employing budget gimmicks with the funding that supports our Marshals, FBI, DEA, ATF and others, agents putting themselves in harm's way on a daily basis.

General Holder, we welcome you to the subcommittee and look forward to your testimony.

Mr. WOLF. You may summarize your remarks. Your full statement will appear in the record, but you can summarize as you see fit.

OPENING STATEMENT—ATTORNEY GENERAL HOLDER

Attorney General HOLDER. Chairman Rogers, Chairman Wolf, Ranking Member Fattah and distinguished members of the subcommittee, I want to thank you for the opportunity to appear before you today and for your ongoing support of the Justice Department's critical work.

I look forward to providing an update not only on the recent progress but also on the future plans and specifically discussing how the President's proposed budget for fiscal year 2013 will enable the Department to more effectively fulfill its core missions and build on what I think is an extraordinary record of achievement.

The President's budget demonstrates a really strong commitment to the Justice Department's work and ensures that we will have the resources necessary to meet our essential responsibilities. Of course, no responsibility is more important than our obligation to protect the American people from terrorism, from violent crime, from financial fraud and from a range of threats that put our national security and our economic stability at risk.

In each of these areas, and really despite unprecedented demands and fiscal constraints that we have had to confront in recent years, the Department has made remarkable and, in some cases, historic progress.

We have also proven our commitment and our ability to act as sound stewards of precious taxpayers dollars. For example, in response to my calling to identify savings across the Department, almost \$700 million worth of savings have been developed, funds that are being reinvested in critical mission areas. I also want to note that in the Department's fiscal year 2013 budget of \$27.1 billion, proposed spending increases, increases, have been exceeded by proposed cuts.

Now, since I last appeared before this subcommittee, the Department has achieved several milestones and perhaps most notably in our national security efforts. For example, last May a grand jury indicted Waad Ramadan Alwan on 23 charges, including conspiracy to use a weapon of mass destruction against U.S. nationals abroad, attempting to provide material support to al-Qaeda in Iraq, and conspiracy to transfer, possess and export explosives against U.S. troops in Iraq. In December, Alwan pleaded guilty to all 23 charges.

In October, the Department obtained a conviction against Umar Farouk Abdulmutallab for his role in the attempted bombing of an airplane full of holiday travellers on Christmas Day in 2009, and earlier this month, he was sentenced to four life prison terms.

By working closely with our U.S. and international partners, we have also thwarted multiple terrorist plots, including one by two Iranian nationalists to assassinate the Saudi ambassador to the United States and several others hatched by home-grown violent extremists. We have also secured the conviction of notorious arms dealer Viktor Bout for his efforts to sell millions of dollars in weapons for use in killing Americans.

Now, these are just a few of I think many examples, and with the sustained and additional investments included in the President's budget for the Comprehensive National Cybersecurity Initiative, the High Value Detainee Interrogation Group, the Joint Terrorism Task Forces, the Render Safe Program and other national security efforts, I am really confident that the Department can maintain and can strengthen our intelligence gathering and surveillance capabilities.

I am also confident that with the targeted investments intended in the most recent budget request, we can bring our fight against financial fraud to a new level. Over the last three years and with a host of our Federal, State and local partners working with us, we have come together in an unprecedented national effort to combat and to prevent a wide range of financial fraud crimes. We are holding accountable those who have violated our laws and who have abused the public trust.

Through the work of our U.S. Attorneys' offices and the Justice Department's Civil and Criminal Divisions, we are making meaningful, measurable progress in this fight to ensure stability, accountability and, above all, justice.

Through collaboration made possible by the Interagency Financial Fraud Enforcement Task Force, which was launched by President Obama in 2009, we have taken bold steps to address the causes and the consequences of our economic crisis.

Now, I am honored to chair this initiative. The work of the task force has resulted in charges against CEOs, CFOs, corporate owners, board members, presidents, general counsels and other executives in Wall Street firms, hedge funds and banks involved in financial fraud activities.

In just the last six months, the New York Justice Department has achieved prison sentences of up to 60 years in a variety of fraud cases. We obtained a conviction and a record prison sentence in the largest hedge fund insider trading case in U.S. history, and we have secured lengthy prison terms for the architects of multi-million dollar Ponzi schemes, involving hundreds of investors.

Now, in addition to advancing these and other successful prosecutions, the task force has helped us to identify and focus on priority areas. For example, in recent weeks, it has given rise to two important work groups, the Residential Mortgage Backed Securities Working Group, which brings together a variety of partners in order to marshal and to strengthen current State and Federal efforts to investigate and to prosecute abuses in the residential mortgage-backed securities market, as well as the Consumer Protection Working Group, which will enhance civil and criminal enforcement of consumer fraud as well as antifraud public education efforts.

We have taken other steps to assist struggling consumers and specifically struggling homeowners. Just a few weeks ago, the Departments of Justice and Housing and Urban Development, as well as with other agencies and 49 State attorneys general, achieved a landmark \$25 billion agreement with the Nation's top five mortgage servicers. Now, this marked the largest joint Federal-State settlement in our Nation's history. Of course, this settlement will not by itself cure all of the ails that presently are afflicting our housing market, but combined with other measures, it is a step in

the right direction towards the housing recovery that our Nation so badly needs.

In just the last two fiscal years, we have indicted more than 2,100 individuals for mortgage fraud-related crimes, and last year, the Department's Civil Rights Division through its new fair lending unit settled or filed a record number of cases, including a \$335 million settlement, the largest fair lending settlement in history, to hold financial institutions accountable for discriminatory practices directed toward African American and Hispanic Americans.

But there is perhaps no better illustration of the effectiveness of our antifraud efforts than our recent work to combat health care fraud. Over the last fiscal year alone, and again in cooperation with the Department of Health and Human Services, as well as other partners, and by utilizing authorities provided under the False Claims Act and other critical statutes, we were able to recover nearly \$4.1 billion in funds that were stolen or taken improperly from Federal health care programs, and this represents the highest amount ever recorded in a single year.

At the same time, we have opened more than 1,100 new criminal health care fraud investigations, secured more than 700 investigations, and initiated nearly 1,000 new civil health care fraud investigations. In fact, over the last three years, for every dollar that we spent combating health care fraud, we have been able to return an average of \$7 to the U.S. Treasury, the Medicare Trust Fund and others.

The President's proposed budget also would bolster our fight against international crime networks, drug cartels, gangs and cyber criminals and enhance efforts to identify additional ways to protect the most vulnerable members of society as well as the law enforcement officers who keep us safe. It would also expand on the critical work being done by our Civil Rights Division to ensure that the rights of all Americans are protected in border areas, workplaces, housing markets, as well as voting booths.

Now, I am proud of these and our many other achievements, and I am committed to building on them. I know that you understand that in this time of challenge and of consequence, we simply cannot afford to cut back on the extent or quality of justice that we are obliged to deliver. The Department is responsible for protecting this Nation and enforcing the laws, and these efforts must be appropriately and adequately funded.

I look forward to continuing to work with this subcommittee and with Congress to accomplish this, and I would now be happy to answer any questions that you might have. Thank you very much.

[The information follows:]

STATEMENT OF ERIC H. HOLDER JR.
ATTORNEY GENERAL OF THE UNITED STATES
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED
AGENCIES

February 28, 2012

Good morning, Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee. Thank you for the opportunity to meet with you today to discuss the President's Fiscal Year (FY) 2013 Budget for the U.S. Department of Justice and the Department's key priorities.

I also appreciate the opportunity to tell you more about the good work that is being done by Department employees across the United States and overseas to protect all of our citizens from harm and to ensure equal protection under the law, in order to promote "liberty and justice for all."

The President has emphasized his goal to stabilize the economy by creating new jobs and reducing our national debt through greater revenue generation and spending cuts. To assist in the economic recovery, we continue to ask even more from our talented Department personnel. This is as true in the Department of Justice as it is in the rest of the federal government.

The President has asked the Department to do more with less, recognizing that many across the country are still suffering; I am committed to presenting Congress with a serious and thoughtful budget, which clearly reflects this awareness, and allows us the resources to faithfully carry out the Department's mission and fulfill our obligation to the American people.

Upon careful examination of our mission and the range of the priorities I will present here we cannot simply "cut back" on the extent or quality of justice that we are obliged to deliver; we cannot cease to enforce the law. We cannot ignore an indictment, or choose at the end of the process not to imprison a criminal, if sentenced. We are responsible for enforcing the law, and these efforts must be funded.

What we can and must do, however, is examine the way we do our work, and find better ways to continue to do it well. In response to my call for savings across the Department, my staff developed almost \$700 million worth of budget offsets, so that we can reinvest that money and protect the Department's core mission and priorities. In presenting the Department's FY

2013 Budget, we have aligned the entire amount to pay for high-priority, mission-related needs. Specifically, we have proposed \$228 million in program increases. Our overall discretionary budget authority is reduced from \$27.2 billion in FY 2012 to \$27.1 billion in our FY 2013 request.

In this FY 2013 Budget, we have proposed changes in operational accounts, as well as leadership offices. We have used balances from prior years that were left on the books to offset this year's costs, and we tried to find less expensive ways to accomplish the same outcome.

Each of our proposed reorganizations and realignments has been developed with one goal in mind, to save taxpayers money, while remaining dedicated to our mission to protect our citizens. I can assure you that none of our reorganizations or realignments will compromise this fundamental mission; personnel and resources will be shifted to achieve the same end, to remake the Department of Justice in ways that make us more responsive to the American people whom we proudly serve.

To be clear, then, we at the Department recognize that we are accountable to the American people, to identify and eliminate areas of waste, fraud, and duplication, and also to marshal limited resources for the greatest return on investment. I have carefully reviewed with my staff the Department's FY 2013 Budget request, and have directed them to focus resources on programs that have a measurable impact and demonstrate success in keeping our citizens safe.

In his FY 2013 Budget, President Obama proposes that Congress fund the work of the U.S. Department of Justice in the amount of \$27.1 billion. In this hearing, I would like to focus on the Department's work in six critical areas, namely,

- To sustain our nation's security interests;
- To uphold the Department's traditional mission programs;
- To combat financial, mortgage, and health care fraud;
- To support our state, local, and tribal law enforcement partners;
- To invest in federal prisons and enhance detention capacity; and
- To streamline programs and operations across the Department.

I. National Security

The FY 2013 Budget includes a total of \$4 billion to sustain our first priority – the Department's national security mission. As with our law enforcement mission, the Department continues to work to build strong ties with intelligence and security partners around the world, to protect the American people. At the same time, we are diligent in protecting U.S. technologies, goods, services, and national security interests from illegal tampering, malicious manipulation and acquisition by other countries, in order to maintain our nation's competitive edge.

The funding previously enacted, which the FY 2013 Budget maintains, for our national security programs ensures the continuation of critical investments made to improve intelligence coordination; expands information sharing efforts with trusted counterparts; secures our cyber infrastructure; widens investigations of drug trafficking organizations with ties to terrorist groups; and continues to extend anti-terrorism training to our law enforcement partners.

In the past year, we were successful in several key national security investigations. In October, the Department obtained the conviction against Umar Farouk Abdulmutallab for his role in the attempted bombing of an airplane full of holiday travelers on Christmas Day in 2009. He was sentenced to life in prison earlier this month. Working closely with our U.S. and international partners, we thwarted a plot by two Iranian nationals to assassinate the Saudi Ambassador to the United States, as well as numerous other suspected plots by homegrown violent extremists. We also secured the conviction of notorious arms dealer Viktor Bout for his efforts to sell millions of dollars of weapons for use in killing Americans. In May of last year, a grand jury indicted Waad Ramadan Alwan [al-WAN] on 23 charges, including conspiracy to use a weapon of mass destruction against U.S. nationals abroad; attempting to provide material support to al-Qa'ida in Iraq; and conspiracy to transfer, possess, and export explosive devices against U.S. troops in Iraq. In December, Alwan pleaded guilty to all 23 charges.

In the FY 2013 Budget, the Department seeks to maintain critical counterterrorism and counterintelligence programs, and sustain significant, recent increases related to intelligence gathering and surveillance capabilities; detecting and deterring cyber intrusions and fully supporting cybersecurity through the Comprehensive National Cybersecurity Initiative. We also look to maintain our investments supporting the High Value Detainee Interrogation Group; the Joint Terrorism Task Forces; and the Render Safe Program.

II. Traditional Mission Programs

In the FY 2013 Budget, the Department of Justice seeks increases of \$31.8 million in support of programs in the Department's traditional core mission of combating violent crime, cybercrime, crimes against children and criminal trafficking in persons; and enforcing the nation's civil rights and environmental laws.

A. Criminal Law

In combating organized crime, I announced in January 2011 the single largest operation against the mafia ever undertaken by the FBI, the result of unprecedented cooperation among federal, state, local, and foreign law enforcement personnel. The operation resulted in the arrest of over 100 suspected mobsters—all without a hitch. In July, we announced the results of *Project Delirium*, a Drug Enforcement Administration (DEA) operation targeting La Familia Michoacana [Mee-shoa-CA-na], a violent drug cartel and supplier of most of the methamphetamines smuggled into the United States. Working with other federal, state, local and foreign law enforcement partners, including the Bureau of Alcohol, Tobacco, Firearms and

Explosives (ATF), DEA oversaw more than 1,900 arrests and the seizure of over \$63 million in U.S. currency; over 2,700 pounds of methamphetamine; over 2,700 kilograms of cocaine; 900 pounds of heroin; nearly 15,000 pounds of marijuana; and \$3.8 million in other assets. An ATF investigation targeting a gang in Philadelphia known as the Young Hit Men or Harlem Gang resulted in an 89-count superseding indictment charging 23 members with an array of federal violations, including multiple firearms violations. The trial of these gang members is scheduled for May. And finally, in 2011, the U.S. Marshals Service captured nearly 125,000 fugitives, including seven from their "Fifteen Most Wanted" list in 2011. This was the fourth consecutive year that the U.S. Marshals Service captured over 100,000 fugitives. These are only highlights, but, as you can see, it's been a busy year for the Department.

Investigating cyber crime and protecting our nation's critical network infrastructure is another of the Department's top priorities. Successful cyber attacks can have devastating effects on our national security, infrastructure, and economy; and hackers have been relentless in their efforts to attack U.S. Government agency Web sites, including ours. In combating these efforts, we continue to build and strengthen our capabilities to counter and prevent these attacks. Here again, the Department works on a global scale to achieve success, in cooperation with our law enforcement partners abroad. The FBI estimates that Americans lose hundreds of millions of dollars to cyber criminals based in Eastern Europe alone. Working closely with the FBI Cyber Division and with our Legal Attaché personnel in Bucharest, our Romanian counterparts have arrested over 300 cyber criminals in the last three years. Our efforts to build relationships with foreign counterparts continue to produce real dividends. The FBI, the DOJ Office of International Affairs, and the Southern District of New York cooperated closely with the Israeli National Police and the Israeli Ministry of Justice. Together, we took down two boiler rooms in Israel that had targeted elderly persons in the United States in a lottery telemarketing scam, and had swindled them out of over \$10 million of their hard-earned savings. Thanks to this cooperation, 24 members of the ring were arrested in Israel and the United States; and 19 of the 21 have been extradited to the United States. Most pleaded guilty, and have been sentenced.

In FY 2013, the Department is requesting an increase of \$15.2 million within the Justice Information Sharing Technology program to transform, strengthen, and protect DOJ internal networks. This will counter newly emerging cyber security threats, including insider threats, provide advanced intrusion detection and response capabilities, and implement cost-efficient scalable enterprise architecture.

The FY 2013 Budget also includes \$3 million in new investments to combat transnational criminal organizations, and a total of nearly \$2 billion to maintain the security of our nation's southwest border. The Budget also increases funding for international investigation and deterrence of intellectual property crime by \$5 million, which brings our investment to nearly \$40 million annually to combat online piracy and otherwise protect our nation's intellectual capital and maintain our competitive edge in developing American ideas and technologies to better compete in the global marketplace.

The Department's budget request also supports our continuing work to prevent, investigate, and prosecute child exploitation crimes. Sadly, our caseload in this area continues to increase. Our budget request will fund ongoing efforts to investigate and prosecute offenders such as those who participated in the so-called Dreamboard, an international, members-only, online bulletin board that was dedicated to the sexual abuse of children. Just as Dreamboard's members operated across international boundaries in committing their crimes, so too did law enforcement personnel work across boundaries to take down this nefarious ring. To date, 72 Dreamboard members have been indicted; 53 have been arrested in the United States and abroad.

The Department has successfully investigated and prosecuted public corruption, not only in the several high-profile cases that made the news, but across the United States. The American electorate trusts that their public servants will obey the law; they expect the Department to bring to full justice those who abuse that trust.

B. Civil Rights

A fundamental highlight of the Department's budget request for traditional mission programs is \$5 million in new resources for the Civil Rights Division to prevent and combat human trafficking; hate crimes; and misconduct by law enforcement and public officials. These issues warrant our greater investment and vigilance as we advocate for every American—without exception. Safeguarding the civil rights of every American is at the heart of what we do, and represents our core mission. In this good work, the Department continues to achieve success and helps our nation to create “a more perfect union.”

In seeking redress for the host of inequities uncovered by the mortgage morass, the Department has fought especially hard to protect the civil rights of Americans. Recently, I announced that the Department had reached a \$335 million settlement with a lender to resolve allegations of lending discrimination against African-American and Hispanic borrowers who qualified for mortgage loans, but were charged higher interest fees or were steered into sub-prime loans, solely because of their race and national origin. Over 200,000 Americans will be entitled to compensation. We have also acted to protect the civil rights of our service members who have been targeted by these unconscionable, predatory lending practices. In May 2011, we announced settlements with two lenders to resolve allegations that they had wrongfully foreclosed upon active-duty service members without first obtaining court orders, in clear violation of the Service Members Civil Relief Act. The settlements provided over \$22 million in compensation to our men and women in uniform who were forced to worry about their families and losing their homes through unlawful foreclosures, while also having to endure the horrors of war. We fought hard for them because we believe that, as Americans, we are much better than that, and that our fellow citizens, who place their lives on the line for all of us, deserve far better than that.

Our other civil rights priorities in FY 2013 include a greater focus upon combating human trafficking; in uncovering and prosecuting hate crimes that target Americans for who they are and what they believe; in upholding and enforcing the constitutional right of every eligible American to participate in our nation's political process and vote freely; and fully implementing provisions of the Civil Rights for Institutionalized Persons Act.

C. Environment and Natural Resources

Since 2011, a team of our agents and prosecutors continues to lead the Deepwater Horizon Task Force, which has investigated the conduct of those involved in the tragic explosion and oil spill that claimed the lives of 11 people; despoiled the coastal waters of the Gulf of Mexico; killed scores of wildlife; and damaged the vibrant economy of a beautiful region, which our citizens have struggled mightily to restore.

III. Financial, Mortgage, and Health Fraud

In our FY 2013 Budget, the Department seeks an increase of \$55 million, for a total investment of over \$700 million, to investigate and prosecute financial and mortgage crimes that have sorely hurt the American people and damaged their trust in the financial markets they expect to engage in fair play. The abuses by many in the financial sector have had a devastating effect on the U.S. economy, and have contributed significantly to the economic suffering of so many Americans. It is essential that the Department address these abuses forcefully, to hold fully accountable those who are responsible for these abuses and ensure that they are not repeated. In this budget, we propose an increase in specialized staffing and technologies to combat and root out fraud in the area of securities and commodities; investment scams; mortgage foreclosure schemes; and increasingly, in health care fraud.

The program increase of \$55 million would provide funding for additional FBI special agents, criminal prosecutors, civil litigators, in-house investigators, forensic accountants, and paralegals to hone the Department's capacity to investigate and prosecute the full spectrum of financial fraud. Bringing aboard specialized and dedicated personnel, especially investigators and forensic accountants, is key to our successful detection and prosecution of complex financial schemes, and helps us to stay well ahead of the criminals who devise them. Of the \$55 million program increase, \$37.4 million is to increase criminal enforcement efforts and \$17.6 million would increase civil enforcement efforts. Our total request also includes \$9.8 million for technology tools and automated litigation support.

We have already been actively engaged in these efforts. Since FY 2010, the Financial Fraud Enforcement Task Force has spurred investigation and prosecution of financial fraud that has been uncovered by the 2008 financial crisis and economic recovery efforts. The task force has charged and sentenced a great number of defendants involved in securities fraud, investment fraud, Ponzi schemes, and other financial fraud. In October 2011, the managing member of Galleon Management LLC was sentenced to 11 years in prison, based on the Department's

investigation of the largest hedge fund insider trading scheme in history. We also continue to aggressively prosecute those who commit mortgage fraud. Mortgage fraud victims include distressed homeowners preyed upon by fraudsters posing as foreclosure rescue experts; the elderly who are victimized in Home Equity Conversion Mortgage or “reverse mortgage” schemes; U.S. service members; and entire neighborhoods blighted by blocks of abandoned homes. In FY 2011, the U.S. Attorneys’ Offices filed 513 cases against 947 defendants, an increase of 92 percent in just two years.

Earlier this month, I joined Housing and Urban Development Secretary Shaun Donovan and the Attorneys General of Colorado, Indiana, North Carolina, Illinois, and Iowa to announce the unprecedented agreement reached by the Federal Government and state attorneys general with the nation’s five largest mortgage servicers to address mortgage loan servicing and foreclosure abuses. This agreement--the largest joint federal-state settlement ever obtained--provides substantial financial relief to homeowners and establishes significant, new homeowner protections. It holds mortgage servicers accountable for abusive practices and requires them to commit more than \$20 billion towards financial relief for consumers. As a result, struggling homeowners throughout the country will benefit from reduced principal amounts and the refinancing of their loans. The agreement also requires substantial changes in how servicers do business, which will help to ensure the abuses of the past are not repeated.

Moreover, on January 27, I announced the formation of the Residential Mortgage-Backed Securities Working Group, supported by current manpower and funds, to leverage state and local resources in a nation-wide effort to investigate and prosecute crimes in the residential mortgage-backed securities market. The Department will join the Securities and Exchange Commission and the New York State Attorney General under authority of the Financial Fraud Enforcement Task Force in leading the working group, which will be staffed by at least 55 DOJ agents, analysts, investigators, and attorneys from around the United States.

Finally, the Department remains fully engaged with the Department of Health and Human Services (HHS) to prevent and combat health care fraud. Earlier this month, HHS Secretary Kathleen Sebelius and I reported the success of our joint efforts, having recovered nearly \$4.1 billion for U.S. taxpayers in FY 2011. The three-year average return on investment for health care fraud funding in FY 2011 was over \$7 for every \$1 invested – the highest ever for this program.

In FY 2013, we plan to redouble our efforts and ask Congress for \$294.5 million through the HHS budget for health care fraud funding to support DOJ initiatives to combat civil and criminal health care fraud. Increased funding will permit the Department to expand Medicare Fraud Strike Force operations and to more effectively target locations where health care fraud activities are rampant. We also propose additional support to bolster civil enforcement efforts, including False Claims Act matters, to investigate and prosecute fraud by medical and pharmaceutical providers.

IV. State, Local, and Tribal Law Enforcement

In our FY 2013 Budget, the Department seeks a total of \$2 billion to assist state, local, and tribal law enforcement personnel, especially in combating violent crime and violence against women and all other victims of crime, and in supporting victim programs.

The Department's budget request is strong on law enforcement; it's strong on solid program research and development; it's strong on juvenile justice; and it's strong on innovation. In presenting this budget request, we've taken a long, hard look at what has worked best in these areas, in order to extend these best practices across the broad range of our work.

The key to the Department's success in protecting the American people continues to be in developing effective partnerships with law enforcement counterparts throughout the United States and abroad to leverage a more focused and effective law enforcement response. To put this in perspective, there are 65,000 U.S. federal agents dedicated to criminal investigations; by comparison, there are 700,000 state and local law enforcement officers in the United States, not to mention scores of others who work for agencies from other nations. Crime is increasingly transnational and global in scope, and criminals respect no boundaries. We owe it to the American people to work closely with our partners—at home and abroad—to prevent these criminals from harming our citizens, and to ensure that those who do so are brought to justice.

Here at home, one of our most important partnering programs is the Community Oriented Policing Service (COPS) grant program. These grants assist state and local police in hiring officers for targeted patrol and other proven strategies to reduce and prevent crime. From FY 2009 through FY 2011, the COPS Office funded more than 7,100 positions. Over 5,000 of these positions have been filled so far; nearly 4,000 of them as new hires. The Budget requests an additional \$91 million for the COPS Hiring Program in FY 2013, for a total of \$257.1 million. Of this amount, \$15 million will be dedicated to community policing development initiatives and \$15 million will be directed to tribal jurisdictions.

It is worth noting that COPS will be giving preference in any FY 2012 hiring grant award to communities that hire post-9/11 veterans of our armed forces. Put simply, this is the right thing to do, and I assure you that this policy will continue in grants funded by the FY 2013 appropriation.

To give you an idea of the impact that COPS funding has had within local communities, let me tell you about Fresno, California. Given budgetary constraints, the Fresno Police Department had lost 100 sworn police officer positions and 265 civilian positions over a three-year period. COPS funding added 41 front-line officers who helped Fresno reduce violent crime by targeted removal of dangerous criminals from the community's streets. The results are impressive. In 2011, Fresno experienced decreases in violent crimes across the board and had its lowest murder rate in a decade. Without COPS funding, the Fresno Police Department would have been forced to disband its violent crime impact team and redeploy officers into patrol, and

merely react to crime. Instead, COPS funding helped the people of Fresno become more active in safeguarding their community.

In this area, too, the Department seeks funding for grant programs proven to be effective in preventing crime. Increased funding is requested for the Byrne Criminal Justice Innovation Program; for residential substance abuse treatment; for Second Chance Act implementation; for Part B Juvenile Justice Formula Grants; and for a new, evidence-based juvenile justice competitive demonstration grant program.

The Adam Walsh Act significantly enhances the Department's ability to respond to crimes against children and vulnerable adults, and to prevent sex offenders who have been released back into the community from victimizing others. The FY 2013 Budget also includes \$20 million for states and local jurisdictions, and an additional \$1 million to develop the National Sex Offender Public Web site.

Finally, a significant outlay under the FY 2013 Budget includes increased funding to squarely address domestic violence and child abuse in rural areas through support of projects specifically designed to prevent these crimes in rural jurisdictions. A significant portion of these funds will be dedicated to implementing public safety programs in Indian country, to assist tribal law enforcement partners in reducing the disproportionately high levels of violent crime there.

V. Prisons and Detention

In the Department's FY 2013 Budget, we are seeking \$8.6 billion to ensure that prisoners and detainees are held in secure federal facilities and to improve federal prisoner re-entry.

Last year, the Department made strategic investments to enhance the nation's security and make communities safer. There are over two million people incarcerated in the United States; estimates project the federal inmate population in the United States to increase by 6,500, in addition to the estimated 5,000 inmates who will be processed in FY 2012. The FY 2012 enacted appropriation included partial funding for activation of new prisons in Alabama and New Hampshire. In the FY 2013 Budget, the Department requests funding to fully activate these facilities and initiate two others, in Mississippi and West Virginia. In all, the Department plans to add 2,500 prison beds and 1,000 new, low-security contract confinement beds in FY 2013. The Department will also direct increased funding to hire additional corrections workers and cover increased costs to transfer, accommodate, and secure the larger prisoner population.

While opening the secure facilities we need to confine criminals, the Department's budget request also addresses the parallel need to free up prison space and reduce long-term detention and incarceration costs. This budget recognizes the need to work with you in Congress to make simple changes to the calculation of good conduct time, and to explore ways to further reduce recidivism. These proposals provide proven incentives for good behavior among certain eligible, non-violent inmates, and their participation in programs designed to keep them from

returning to prison, and will have a direct impact in relieving overcrowding in federal prisons. Beyond the steps proposed in this budget, the federal government has an opportunity to build on the work of states like Texas and Indiana to modernize criminal sentencing, ensuring that violent and career criminals remain behind bars and off the streets, while strengthening programs to help eligible, non-violent offenders to safely and productively re-enter their communities.

The programs we propose to fund aim to reduce recidivism by expanding participation in these re-entry programs. The Department's FY 2013 Budget request includes expansion of the Bureau of Prison's residential drug abuse program, which supports Second Chance objectives. This expansion will enable greater use of the sentencing credits available to eligible, non-violent inmates who complete drug treatment programs. Thus, as this program contributes to reducing crime, it will also result in fewer taxpayer resources directed at incarcerating inmates.

VI. Savings and Efficiencies

The Department's FY 2013 Budget presents a highly streamlined array of programs, which will help us to achieve our mission more efficiently while protecting the American people more effectively.

The Department of Justice proposes almost \$700 million in efficiencies, offsets, and rescissions. We in the Department recognize that we must do our part to help our nation maintain its sound fiscal footing. In our FY 2013 Budget request, we seek to balance fiscal responsibility demanded by the American people with the Department's national security and law enforcement mission to prevent, prosecute, and bring to justice all who would do us harm.

In leading this effort, I directed Department staff to identify areas where we would achieve significant savings for the American taxpayers by implementing changes in the way we execute our mission. These changes include improving the way we target funding, seeking support for programs that work; redirecting funding from the Department level to component agencies to reduce overhead and increase operational efficiency; and consolidating offices and redirecting or reducing personnel and resources.

In all, we identified \$646.6 million in administrative efficiencies, non-grant program reductions, and rescissions of prior year balances, which will reduce our bottom line without impairing our mission or capabilities.

In submitting the Department's 2013 Budget request, I emphasize that we continue to hold the line on expenses, seek to eliminate waste, and promote efficiencies. In this request, we propose to reorganize the Department by consolidating offices. In doing so, we will become a leaner, more agile, and more responsive organization. Our goal is to enhance our service to the American people, without sacrificing the essential mission. Instead, we intend to realign our staff and resources to meet the greatest needs.

In proposing these realignments, we add our efforts to the President's Campaign to Cut Waste. In July 2010, I launched the Department's Advisory Council for Savings and Efficiencies, or the SAVE Council, to focus these efforts within the Department. In just the last two years, the SAVE Council has helped the Department realize nearly \$60 million in savings and cost avoidance.

The 2013 Budget includes savings expected from merging detention functions currently performed by the Office of the Federal Detention Trustee into the U.S. Marshals Service, merging core functions of the National Drug Intelligence Center into DEA, and transfer management of the Law Enforcement Wireless Communication program to the FBI, returning funding and the concomitant responsibility for radio operations and maintenance to the Department's law enforcement components.

Additional savings and efficiencies were identified in the areas of information technology, space requirements, overhead, administration, and operations. For example, the IT offset represents savings that will be developed through greater inter-component collaboration in IT contracting; funds will be redirected to support the Department's cyber security and IT transformation efforts and other high-priority initiatives.

VII. Conclusion

In conclusion, I am keenly aware that the President and I have asked the Department's dedicated employees to do much more with fewer resources during this period of economic recovery. That they have done so with continued dedication to our mission to protect the American people is truly exemplary and inspiring.

I appreciate this opportunity to tell you about our good work at the Department of Justice, to thank you for your support to date, and to ask you to fund the important work that lies ahead.

At this time, I would be pleased to take your questions.

Mr. WOLF. Thank you, sir.

First, Mr. Rogers, chairman of the full committee, and then we will go to Mr. Dicks.

Mr. ROGERS. Thank you, Mr. Chairman, for your great work as chair of this very important subcommittee.

PRESCRIPTION DRUG ABUSE

General, we are glad to have you with us. You will recollect my conversation with you last year on prescription drug abuse.

Attorney General HOLDER. You asked me if I could spell "Broward."

Mr. ROGERS. I got your note. More importantly, I got your report on some real progress I think that you have made in south Florida, particularly in Broward County and the pill mill problem.

I don't need to remind you or anyone else here that the prescription drug abuse now is a huge national problem. In fact CDC, the Centers for Disease Control, with data in January of this year indicates that 15,000 people die each year from prescription drug overdoses, more than heroin and cocaine combined. Nearly half a million emergency department visits in 2009 were due to people misusing or abusing prescription painkillers. And nonmedical use of prescription painkillers costs health insurers up to \$72.5 billion annually in direct health care costs.

In my own district in Kentucky, and in fact the whole State of Kentucky, prescription painkillers are killing more people than car wrecks, and I dare say that is probably a good national standard as well.

The hot spot last year as we conversed was in Broward County, Florida, where 90 percent of all oxycodone prescriptions in the country were issued, but you marshaled the forces, I think adequately so far, in south Florida and have managed to bring the matter somewhat under control. You have got three tactical diversion squads in Florida, and you reported in January that as a result of what is called Operation Pill Nation, there has been a 97 percent decrease in oxycodone purchases by doctors in Florida from 2010 to 2011.

In Pill Nation One, you arrested 47 individuals, 17 of them doctors, five of them clinic owners, the seizure of \$19 million in cash and assets; 70 doctors, six pharmacy owners and five distributors were stripped of their DEA registrations. And then in Pill Nation Two, in October of last year, you arrested 22 individuals, including doctors and pharmacists, charged with illegally diverting controlled substances. Earlier this month, DEA took steps to suspend the controlled substance license of a major prescription distributor called Cardinal Health, and I could go on.

So, I thank you, General, for taking our advice to heart last year. And I am sure you were already involved in it, but I thank you for responding to that urgent problem.

So the pill mills in Florida are still going; they are just not quite as strong as they were. One unfortunate sidelight to that, though, like punching a pillow, you hit it in one place and it pops out in another; and it is popping out in Kentucky and Tennessee and Georgia and other places now. In fact, I think my local law enforcement people tell me that a couple of Broward County pharmacies,

pill mills, are now in my district. And I suspect that could be said by a lot of members here.

I wonder, is there something more that the Congress could do, that we could do, to help in this assault on the pill mill problem?

Attorney General HOLDER. Well, Mr. Chairman, I think that the point that you raised at the end is exactly the right one. This is not a Broward County problem, although it was certainly a place of focus for this issue over the recent past, and I think we have had success there, though not total success. There is still work that we need to do in that area in Florida.

I took a trip down to Florida and worked with the attorney general, Pam Bondi, who is very committed to this work. DEA has made real progress, but we can't be content with the progress we have made, and for exactly the reason that you say. We might be successful in Broward, but these are folks who are then going to go to other places. And we have to have the capacity to deal with these issues in different places.

We have, under the budget that we have proposed, sufficient numbers of people to deal with these issues, as it tends to move from the areas where we are most affected. But the reality is this is not something that is going to be, at the end of the day, a regional problem, but ultimately a national one, as we become more successful. We will catch a certain number of people, but some people will leave those areas and then try to ply their trades in other places.

Mr. ROGERS. And how will you tackle that?

Attorney General HOLDER. Well, to try to identify what the sources are for these pills, to deploy the squads that we have, to put emphasis there, to use the existing DEA presence that is there and augment them with people coming from different parts of the country, the use of task forces, especially working with our State and local partners, to come up with ways in which we get at this problem.

I really think we were successful in Florida from the interaction that you and I had last year, but also working with an attorney general who cared a great deal about this issue and who was committed to it, and then we worked together to put task forces together.

It is not something that, frankly, the United States or the Federal Government can do by itself. We need committed partners at the State and local levels. That is what we have in Florida.

AUTOMATION OF REPORTS AND CONSOLIDATED ORDERS SYSTEM (ARCOS)

Mr. ROGERS. My time is running short here, but let me ask you this: DEA keeps track of the prescription drug supply chain through a thing called ARCOS, Automation of Reports and Consolidated Orders System. That is how they were able to crack down on Cardinal Health and the CVS pharmacies in Sanford, Florida.

Right now, distributors are only required to report narcotics to ARCOS. DEA has indicated that it might be helpful to track other drugs commonly found in Rx cocktails, like Xanax and Valium, which were involved in Whitney Houston's death. What do you

think? Are there ways that Congress or you could improve the ARCOS system in those ways?

PREScription DRUG ABUSE, TITLE 21 STATUTE CHANGE

Attorney General HOLDER. Yes, we were talking about this earlier. This is contained in a statute under Title 21, and if we simply remove the word "narcotic" in the citation that is the governance here and replace it with the word "all," we would have the ability to deal with the problem that you have described. We would have under the ambit of this statute things that go beyond those that are just described as narcotic and deal with other things, other drugs, other pills, whatever, that are, if not equally pernicious, certainly have a potential negative impact. Expanding the statute in that way would make a lot of sense. So it really is just a statutory change that we could use.

Mr. ROGERS. It would require a law change?

Attorney General HOLDER. It would.

Mr. ROGERS. I think we will take that under consideration. We don't authorize on this committee, often, but maybe the authorizers will take note of that.

Thank you, General, for what you are doing.

Attorney General HOLDER. Thank you, Mr. Chairman.

Mr. WOLF. Thank you very much.

I had forgotten about the exchange between you and Mr. Rogers last year, but I appreciate the fact—I have worked with Mr. Rogers over the years on this, and I appreciate what you have done.

When you were speaking, I said is there any new authority that we could carry, and I will be glad to work with Mr. Rogers and maybe we can work with the authorizers and carry that in the appropriations bill, if it is just the movement of one word.

Secondly, should there be any increased penalties, if you could just think about it and let us know?

PREScription DRUG ABUSE, GOVERNORS CONFERENCE

Then thirdly, if there is a good idea, would it make sense for you to have a conference of all the Governors or representatives of all the Governors. Commerce did it on tsunami preparedness. There have been different things, and maybe bring them altogether. It is a growing problem. So would there be any merit for you to have a conference whereby you bring all the people in, every Governor's office, to talk about this issue?

Attorney General HOLDER. Yes, I think that is actually a very good idea, and my guess would be that we would probably get some willing participants. It would be good if we could have Republicans and Democrats, Federal and State officials at such a conference to deal with what is a growing problem and to raise the consciousness of this Nation about this issue. People too often think of it as something that exists over there when it is truly a national problem.

If I can just take a minute, a few seconds, I talked to my wife just last night about a young woman who have I known since she was a baby, who is now in a drug rehab program as a result of her now being involved in a pill addiction. I thought it was interesting that I heard about this anticipating this might be something that we want talk about today. She is a young, bright woman who made

some bad decisions. And she is not unique. You know, she is not unique. And the notion of having some kind of a conference, a national conference, that would be seen as not a law enforcement effort, something that would be seen as a bipartisan effort involving different branches of government and a commitment expressed by the legislative branch and the executive branch to work together with our State and local partners. I think it would be a very powerful thing, and I think would be extremely useful.

Mr. ROGERS. If the chairman would briefly yield, Mr. Kerlikowske, the head of the ONDCP, just concluded such a meeting with the Governors from the Appalachian States, where the problem probably is maximized, with great results. And all those Governors now are working in tandem across party lines and across the region. And I think the Chairman's idea and your discussion of a national summit, if you will, of the Nation's Governors and anyone interested in this problem would take place would be absolutely worthwhile.

This is a major epidemic. CDC, I met with them the other day, are greatly concerned about this. In my district, and I dare say in many others in the country, over half of our children are not living with a parent because of the drug problem. And it is mainly now prescription medications. They are in prison or they are running around the countryside or whatever, and those kids are just on the countryside. We can't take that, Mr. General.

Attorney General HOLDER. I think you are right. But the thing that is missing and why the idea of a conference is a good one, and certainly something that you have focused on, Chairman Rogers, is that people when they hear "drugs," think of crack or cocaine or methamphetamine. One of the realities is that people are not focusing on prescription drugs to the same extent. And that is an extremely pernicious part of this problem and in some ways, in some ways, is probably the most serious, because it is something that you see, not in the most distressed parts of our country, but in middle-class neighborhoods. The young woman I was talking about was in college; with great parents who have great jobs. Again, as I said, she is not unique. This cuts across socioeconomic lines, across geographic lines, and it is something that I think we need to raise the consciousness of the Nation about.

So I think it is great what Gil Kerlikowske did with Governors in a particular region, but this is a national problem that we need to somehow have the Nation be more aware of.

Mr. ROGERS. As we were so tragically and sadly reminded of in the overdose prescription death of Whitney Houston, that is not unusual, as you have said, unfortunately.

Mr. WOLF. Well, I appreciate Mr. Rogers bringing this up and what you are doing. I would be glad to participate with you for you to put the prestige of the Attorney General's Office behind it and do something. It would be relatively inexpensive. So we will stand with you.

And then if there are any language changes that you think that we should have, and we can work with Mr. Rogers about seeing about them.

Thank you, Mr. Chairman.

Mr. Dicks.

Mr. DICKS. Thank you, Mr. Chairman.

And welcome, General Holder. I got to hear most of your statement, and it sounds to me like you are doing an outstanding job. And I want you to know that you are going to be treated today with respect from this subcommittee.

CYBER CRIME

The one thing I wanted to ask you about is cyber crime. General Alexander, Commander of U.S. Cyber Command and Director of NSA, believes that malware, malicious software designed to disrupt computer operation, gather sensitive information or gain unauthorized access to computer systems, is being introduced at a rate of 55,000 programs infecting computers each day. General Alexander has estimated the cost of cyber crime to the global economy is about \$1 trillion annually and the U.S. portion of these global losses is likely measured in hundreds of billions of dollars.

What is the Attorney General—I know the FBI is involved in this. What do we do? I mean, we are being attacked every single day by foreign countries, by criminals, who are stealing intellectual property at a rapid rate. How do we respond to this, and do you think we are doing enough?

Attorney General HOLDER. I think that we have made a significant start. I think we have to fight it on a whole bunch of levels. The threat that we face potentially has a national security component. Our infrastructure is at risk. There are certainly commercial components to this problem, as you were saying, the theft of intellectual property. So we have to have a holistic approach that involves law enforcement, the military, our intelligence community as well.

One of the things that we need to do is to interact with Congress to see if there are new tools that we need. I think we have been pretty successful in dealing with this issue. We have tried to raise the consciousness within government of the need to mobilize our resources for the constant probing, if not attacks, that we see from nation states who are engaged in this practice, in addition to organizations and individuals who are using cyber tools to do harm to not only our Nation but our allies as well.

So one of the things that I would think would be useful would be for an interaction. Maybe we come up with a list of those kinds of changes that might be helpful. I think we have in the budget sufficient resources to do that, which I think is appropriate. But I also worry that maybe we don't have all the statutory tools that would be useful.

CYBER CRIME LEGISLATION

Mr. DICKS. Do you think that—there is a new bill that was introduced in the Senate that I understand the administration is supporting, I think it was introduced by Senator Lieberman and others. I am told that a lot of the companies are resisting legislation, that they are saying they don't want to be regulated. In some cases, they don't even know that they have been penetrated. So the question becomes are we going to have to require them to better protect themselves on—you mentioned infrastructure, things like our utilities or our financial institutions. When we have a big

power outage here in the D.C. area, it causes havoc. If the whole country was attacked that way—I mean, at some point, are we going to just say we have to give you more authority to deal with this problem? And I think you should send up to us a list of things that might be considered.

Attorney General HOLDER. Well, first, we do support the Lieberman-Collins bill. People should not shudder when you hear that the executive branch wants greater tools. Some of the things that we need are just mechanisms by which we have the ability to communicate with people in private industry so they feel, I don't know if secure is the right word, but safe; so that they don't feel threatened by the ability to interact with those of us in government who are really trying to protect them. We have access to tools and information and intelligence that we can share in appropriate ways so that they can enhance their defensive capabilities.

This is something that has to involve some kind of interaction between those in the private sector and those of us in government, and how we exactly do that—I mean, I understand at least some of the concerns they have, but I think those concerns can be allayed with good dialogue and, frankly, with more interaction than we now have.

INTERNATIONAL CYBER CRIME

Mr. DICKS. What about these countries that are doing this to us? I mean, how do we get their attention that this is unacceptable?

Attorney General HOLDER. I will say that one of the things that I did on a trip to China about 18 months or so ago was to bring that message to that nation, which is a competitor. We are Americans. We can handle anybody who wants to compete with us on a level playing field. But some nations are doing things that I think are inappropriate, a little underhanded, and I think we have got to be forceful. We have to be frank with nations who would engage in those kinds of activities.

And then to the extent that we can use the trade organizations that we have and then ultimately start to consider whether there are things that we want to do to punish nations who are seeking unfair advantages by the mining that goes on through their cyber activities where there is simply the theft of our intellectual property.

You know, Hollywood produces a movie, and it shows up in another country almost before it shows up on the screens here in the United States. Software that we produce, iPods, things like that, knock-offs appear in other countries where our ideas are simply stolen. And that has a drastic economic impact on this Nation. We are talking about a loss of jobs as a result of this kind of activity, and given what this Nation is struggling with in that regard, this has to be a national priority.

Mr. DICKS. Thank you.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Dicks.

We are going to have, Mr. Dicks, a briefing of all the members of the Committee and the Subcommittee on this very issue.

Mr. Rogers, Chairman of the Intelligence Committee, said there are two kinds of companies: those who have been hit by the Chi-

nese and know it, and those who have been hit by the Chinese and don't know it. And they are also hitting law firms downtown and many other people. So we are going to have a briefing, I think, at the end of the month to bring everybody together, and the FBI is coming up to put the briefing on.

PROGRAM REDUCTIONS IN FISCAL YEAR 2013 BUDGET

Mr. Attorney General, your budget declares that defending national security from both internal and external threat remains the Department's highest priority, but you are not requesting any program increases for national security-related activities at the FBI, DEA, U.S. Attorneys or National Security Division. There is no increase in counterterrorism, intelligence, counterintelligence or surveillance. And, in fact, the budget proposes program reductions of \$63 million from the FBI and the rescission of an additional \$162 million, also from the FBI.

So what FBI-specific activities will you be targeting for these cuts? Will they be in the national security area?

Attorney General HOLDER. One has to understand that over the course of the last 10 years or so, since 2001–2002, the Justice Department budget has gone up by about 300 percent in terms of national security, and justifiably so, given what we faced on September 11 and all of the threats that we have had to try to deal with since then.

We have also received significant increases in recent years, \$70 million and 92 positions in fiscal year 2012. It is our view that, talking to Bob Mueller and the other people who are engaged in the national security sphere within the Department of Justice, that the numbers that we have proposed are adequate to the job that the American people expect us to do.

FISCAL YEAR 2013 BUDGET

Mr. WOLF. Was this a request of OMB, or was the request higher and this is the agreed upon position after OMB reached a conclusion?

Attorney General HOLDER. No, this was a number that we came up with. Obviously, there was interaction with the folks at OMB, but I think the number that ultimately came out of those conversations is one that we are satisfied with.

Mr. WOLF. Could we see the number that you submitted over there and then we can compare it with the number that we have?

Attorney General HOLDER. You want to get me in trouble. I am not sure exactly how that works.

Mr. WOLF. Well, if you can and you are not violating the law. We certainly don't want you to do that. If you can.

Attorney General HOLDER. It is not violating the law.

Mr. WOLF. If you can, we would appreciate that. Then we can make a decision as to where the numbers were and what was taken down.

Attorney General HOLDER. I have to say that to the extent there was a difference, it was not an extraordinary one. But I will see if we have the ability to share that.

[The information follows:]

NATIONAL SECURITY FUNDING REQUEST

The process involved in the formulation of the fiscal year 2013 President's budget request—and, indeed, any fiscal year's request—is confidential. This is based on the “deliberative process privilege,” and is intended to promote free discussion between executive agencies and the President. As such, I cannot share information pertaining to funding levels at any stage of the Executive Branch review process.

That said, as I mentioned at the hearing, I stand behind the national security request and believe that the President's Budget provides sufficient resources to ensure that we will continue to meet our essential responsibilities, including our responsibility to protect the nation and our interests from harm.

Mr. WOLF. Great. That will just give us some guidance as we look at things.

GUANTANAMO BAY

We discussed several times the Justice Department's leading role in the task force, this is on Guantanamo Bay, to come up with recommended dispositions for the 242 individuals who were held at Guantanamo at the beginning of the administration. Many of those reviews led to the transfer of detainees to other countries, such as, Yemen, a bad place to go, or Somalia; there is no way to find out where they are going. But also I think it should be noted in fairness that the previous administration also transferred many more detainees overseas.

The primary concern though has been the recidivism among this group—that is, people who are known or suspected to have engaged in terrorist or insurgent activities. I understand that other elements of the Executive Branch are following this closely. What is your understanding about recidivism trends and percentages? I saw one the other day from the ODNI that was in the area of 27 percent recidivism. Can you comment on that?

Attorney General HOLDER. Yes. That overall recidivism rate I think, it is in the 20s, the mid-20s, something along those lines, though the recidivism rate for those who have been released under the Obama administration and through the process that we went through, where we had individual determinations made with regard to each of the people who are there, I think we are down now to about 170 or so, the recidivism rate is about 7 percent.

Now, part of that might be, to be very fair and honest with you, because we are talking about a limited amount of time that these people have been released. I think also it is a function of the fact that, through this task force that we created and the levels of review that it had to go through, ultimately the principals had to agree unanimously on the decisions that were made involving the intelligence community, the law enforcement community, people on the diplomatic side, that we have come up with good decisions with regard to who got released, where they were sent.

The President also has made appropriate determinations, given the situations on the ground in certain countries, Yemen among them. Decisions to release people and place them in Yemen are simply going to be put on hold until we have a more solid situation in that country.

Mr. WOLF. Well, I hope so. I don't think anyone should be released back to Yemen, and most of them, a majority I understand, are from Yemen that are now at Guantanamo. And no one should

be sent back to Afghanistan, and nobody should be sent back to Somalia with al-Shabaab.

What, if any, role is the Justice Department playing in decisions concerning the disposition of the detainees who remain at Guantanamo, and does the recidivism trend affect how these dispositions are likely to be handled? We have heard and I have seen articles in the paper that the White House has confirmed that diplomatic efforts are underway to discuss the transfer of five Guantanamo Bay Taliban detainees to Afghanistan or a third country. It has also been reported that particular individuals were categorized as too dangerous to release by the Department of Justice-led task force.

Does an interagency group review and approve such transfers? Is the Department involved, and is there really a chance that anyone from Guantanamo Bay, Taliban detainees, will be sent back to Afghanistan or a third country?

Attorney General HOLDER. Well, the Department remains involved in these decisions with regard to who might be released. It is an interagency process. A number of things have been considered to try to move the peace process forward in Afghanistan. But we always have to take into consideration the situation on the ground as we presently face it. What has happened in Afghanistan over the last few days, has to be dialed into exactly what it is we would do with regard to the movement of any people who are Taliban-connected. And so these are the kinds of things that the interagency group will be thinking about before any final decisions are made.

AFGHANISTAN-PAKISTAN STUDY GROUP

Mr. WOLF. I am going to go to Mr. Fattah. This is really not a question, but I would ask for you to help us get the word to this Administration. This Committee set up an Afghanistan-Pakistan study group to look to see where we are. And after this weekend—and Ryan Crocker supported this when I put the amendment in. Ambassador Neumann supported it. A lot of people supported it.

The Administration has done nothing. We put \$1 million in. We allowed Leon Panetta and the Administration to pick—I was the author of the Iraq Study Group, the so-called Baker-Hamilton Commission. We give the Administration the money, five Republicans, five Democrats, all who are not involved in the political process today, similar to, if you recall, the Iraq Study Group. Panetta served on the Iraq Study Group.

Could you see? I can't get any answer. I write down to the Department of Defense, but no one responds. It is like their mail room is shut down, and mail is not getting through. But in light of the last, as you said, 48 hours, to have those two Americans shot execution-style, the number of "green-on-blue" attacks, and since you are directly involved in this issue, could you see whether the Administration plans on moving ahead? I think it would be an opportunity to bring people like James Baker and Lee Hamilton, they would be different people, to come in—actually Gates served on the Iraq Study Group. So here you had Panetta, who served on the Iraq Study Group when a war was going on for three and a half years, but refuses to look at the Afghanistan war, which has been

going on for ten years, and if you would look into that and get back to us, I would appreciate it very, very much.

Attorney General HOLDER. That is fine. We can do that.

Mr. WOLF. Okay. Thank you.

Mr. Fattah.

Mr. FATTAH. Thank you.

Let me join with full committee Chairman Rogers and Chairman Wolf in showing appreciation for the work you have done in terms of Broward County and a 97 percent reduction in illegal prescription pill traffic out of Broward County.

REDUCTION OF CRIME IN THE UNITED STATES

But let me go to the generality here. Since you have taken over as the U.S. Attorney General in 2009, crime in our country has gone down by 6 percent, and the preliminary data from 2010 and 2011 show there has been another reduction of 6.4 percent. In terms of all the tools at your disposal, FBI, DEA, the whole array of support that you have, what do you see as the most important in the reduction of crime that the Nation sees, which runs contrary to the normal theory that with high unemployment you would see an increase or uptick. So if you could speak to the committee about how you see what has unfolded and how that relates to your budget going forward.

Attorney General HOLDER. Well, I think, you know, there are a number of theories as to why we have seen this historic drop in crime. We are at rates not seen for 40, 50 years, and I think it has to do with what I would call non-traditional law enforcement efforts and our focus on doing the traditional kinds of things, identifying criminals, putting them in jail, some for extended periods of time if that is appropriate. But I also think we are reaping the benefits of what we did in the 1990s, where we focused on prevention and tried to come up with ways in which we dealt with the underlying social conditions that tend to breed crime. We focused on mentoring, the kinds of things that law enforcement is not typically thought of as being involved in. And I think we are now, as I said, reaping the benefits of that. Dealing with schools that don't educate, dealing with rates of unemployment that are too high, talking about men who are not engaged in the raising of their children and, in particular, raising of their sons. All of these things I think have an impact on the violent crime rate, but don't necessarily show up as things that are going to knock the rate down over the course of a year, 18 months. But you can see it over the course of 5-10 years, and I think we are seeing the benefits of that.

I also think the use of task forces, using our State and local partners and coming up with better ways to identify what problems are in a particular neighborhood, or in a particular community, and getting those 3, 4, 5, 6, 7, 8, 9 individuals out of that community, helps you then see really dramatic drops in crime. So I think all of those things are a part of it.

But I will say just one thing that is extremely disturbing to me. While we have seen this dramatic drop in crime generally, we have seen a dramatic rise in the number of law enforcement officers who have been killed, shot, over the last two years. And it is something that I really try to focus on and something for which we saw a 20

percent rise over the last couple of years, and that is inconsistent with where we see crime as generally going. That is something that I think is worthy of attention and study.

TERRORISM

Mr. FATTAH. Let me go to this question of terrorism.

As we left town a week or so ago, your Department orchestrated the arrest of someone who was attempting a terrorist attack on the Capitol. We want to commend you for that work. But if you look throughout the work that you have done, you have been very successful, and you have talked about a little bit of this in your testimony today, this general work related to terrorism both in terms of stopping and preventing attacks that are quite numerous and also successful convictions of people who have tried to perpetrate attacks.

I visited the Terrorist Screening Center in Virginia and saw the collaboration of all of the agencies working together, and I think it has created a much, much more efficient and effective process. I want to commend your team for what they have done in terms of putting this together.

FISCAL YEAR 2013 BUDGET

But the chairman asked you about the fact that you don't make any new requests in the national security area. Now, in the totality of your \$27 billion or so budget, you have about \$4 billion in national security. And I know that this is an environment where we want to cut budgets, but we don't want to make cuts that cause us challenges down the road. So I just want to make sure that you have ample opportunity to express to the committee whether or not there are additional resources that you see that are needed beyond what is before us at this time?

Attorney General HOLDER. Well, I think one has to understand that in terms of the budget that we have requested, we have not requested an insubstantial amount of money for the national security components within the Justice Department, and given the amounts of money that we have received over the years and after having brief, frank conversations with Bob Mueller, the head of the FBI, talking to our partners in the executive branch, and whether or not we are being good partners and whether there are things that we need to do, I think that we have come up with a budget for the national security side that is adequate and will allow us to do the job that the American people expect us to do.

We have made great use of the resources that we have. I have asked the people in the Justice Department to do a lot more with less, and they have responded very admirably, as have agents at the FBI, the DEA and the ATF, all of whom are working in some form or fashion on the national security problem. And then through the task forces, we have tried to make efficient use of our State and local partners, who in a really fundamental way have the most direct contact and have their eyes and ears peeled to what is really going on in the streets. And but for that interaction, some of these plots that we have uncovered and foiled would not have been possible.

Mr. FATTAH. Well, as I mentioned, I went out to visit, in the chairman's home State of Virginia, the Terrorist Screening Center, and I thought that the collaboration between all the agencies really was what was amazing to see, that these walls have been broken down.

MORTGAGE FRAUD

Let me move to my last two points. One is I want to commend you for the work you have done on health care. But I sent you a letter in 2009 about mortgage fraud, and I do want to take note that you have made thousands of cases in this area now. There was a dearth of activity in this regard in the Department prior to you taking over, and I note that you have now a new entity inside the Department that is going to focus even more so, focus on fraudulent activities that are being perpetrated on the American public relative to mortgages.

So if you would speak for a minute on that, and then I have one last question on missing children, the Center For Missing and Exploited Children.

Attorney General HOLDER. The residential mortgage backed security initiative is one that will look at the ways in which those securities were sold. It is a task force that involves not only the Federal Government, but our State partners. The attorney general from New York, Eric Schneiderman, is a critical partner in that effort. He has been really aggressive in that way, and there are some unique laws in New York—frankly, far better laws than we have on the Federal side. We are working also with Kamala Harris, who is the attorney general in California, in that regard, and other attorneys general who were at the announcement. And that is really going to be something that is going to be effective.

I have heard a lot of concern about the Department not being as effective, as aggressive as it needed to be with regard to certain financial fraud or financial criminals. I don't think that criticism is necessarily justified.

But I also think that we can build on what we have done pretty well over the last couple of years and expand the work that we are doing. And also people should understand there are things in the pipeline, that these things take time to develop. Just because we have not to date revealed all of the cases that we are working on or ultimately will bring, at least not yet, it is not an indication that we have been complacent in dealing with these issues. But I think that new task force is really going to be an important tool in this effort.

NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN

Mr. FATTAH. Lastly, the Center for Missing and Exploited Children is funded through the Justice Department, in part. And, again, you have a collaborative relationship. You have FBI, ATF, DEA, everyone over in that shop working together. One of the things you see in the EU is law enforcement working across boundaries through these various countries, and it is very important in our country that at least across States, that when children are taken, that there be the level of cooperation needed. And I think

that the work of the Justice Department in this regard is critically important, and we want to make sure that is adequately funded.

Attorney General HOLDER. One of the things we have to do in these tough budget times is to look at organizations and efforts that have proven to be successful, and support them, but also to take hard looks and make determinations as to what has not been successful—approaches, organizations—and cut ties with them, or reduce the levels of support.

But that organization, I have known it, worked for it, worked with it for a number of years, and that is really, really, really effective. When it comes to missing and exploited children programs, involving ICAC, the National Center for Missing and Exploited Children, funding has actually increased by 3.1 percent from \$65 million to \$67 million in the proposed budget, and I think that is a recognition, at least on my part and I think people within the administration as well, that the center is extremely effective. They do a good job. They are dedicated people who have devoted substantial parts of their lives to the welfare of children. And the programs that they have put in place, the relationships that they have established makes that an extremely effective and extremely efficient organization worthy of—it is not a huge increase, but given these budget times, that is pretty significant, to have a 3 percent increase.

Mr. FATTAH. Thank you, Attorney General.

Thank you, Mr. Chairman.

Mr. WOLF. Mr. Bonner.

Mr. BONNER. Thank you, Mr. Chairman.

General, it is good to see you again.

Attorney General HOLDER. Good to see you.

Mr. BONNER. Like every member of this committee, we all have questions that are germane to our area of the country, and since I am from America's Gulf Coast, where your wife is from, I am going to take the opportunity to focus for a minute—

Attorney General HOLDER. That is unfair, to throw my wife into this now, you know.

Mr. BONNER. We are very proud of your wife in Mobile.

CIVIL TRIAL FOR BP OIL SPILL

It was reported yesterday that the civil trial for BP and the responsible parties was postponed as negotiations on the settlement agreement moved forward. And I understand that there are probably some things you can't share with us, but what can you tell us with regard from the Department's perspective about where this is?

And for those who may not know or may have forgotten that old saying "out of sight, out of mind," this tragedy that is coming up on the two-year anniversary, April 20, was the worst environmental disaster in the history of the world, certainly in the history of this country. So what can you share with us about where we are in the settlement negotiations with regard to the CWA fines?

And also, I would like to just go on record—and I hope you would comment—I, for one, and I think I am speaking for all the other Members of Congress that represent the five Gulf Coast States that were impacted, would be very concerned by some of the reports that the Department of Justice and the EPA are directing how

some of the money from those fines would go toward the restoration of the economies and the environment. We have been working, we thought in good faith, with the administration, Senator Landrieu, Senator Shelby and others in the Senate, Congressman Scalise and some of us on the House side have been working to try to get language in that directs most of that fine money back to the Gulf Coast States. But could you give us an update on the negotiations and your opinion about that?

Attorney General HOLDER. Sure. I think you are right. There is only so much I can say about the ongoing nature of any talks that might exist. But I can say this: We are prepared to go to trial. We were ready to go to trial yesterday. There has been, I think it has been reported now, a week's delay, and we will see what happens during the course of that week. But we have a strong case. You are right to call it what it is, and I think people have forgotten that. This is the biggest environmental disaster in the history of this Nation. A great many people were harmed. People and organizations have to be held accountable, responsible for the lives that were disrupted, the economic harm that was inflicted upon people who were simply innocent, totally innocent. And we are prepared to hold accountable people both in a civil context, which a trial would start now, and an ongoing criminal investigation. I am satisfied with the progress that we are making, and I would expect that within months we will have something to say in that regard as well. If there is a possibility of a settlement, it will be something that reflects the harm that was perpetrated and will try to make whole people who suffered. But beyond that, it will restore that region to the way it was before the spill. And in that regard, we have tried to work with—and I think we have had a good relationship, certainly with the State AGs who have been our primary contacts in trying to determine how any potential settlement money, whether it comes from a trial or a negotiated agreement on the civil or criminal side. We have tried to come up with ways in which this money is spent that are consistent with the desires of people who live and work and have businesses in the region but also understanding that there is a national concern about that region—which is a very substantial part of this Nation and is responsible for a whole host of things that benefit this Nation economically. But I think we have a good relationship. This is not something that is going to be imposed by the Justice Department, by the EPA. This will be a collaborative process.

Mr. BONNER. You make a good point. The five economies, Texas, Florida, Alabama, Louisiana, Mississippi, if we were our own country, would represent the seventh-largest GDP in the world. And from an environmental impact, seafood production, tourism, a whole range of issues, it is an important part of the country. So I appreciate your comments on that.

GULF COAST CLAIMS FACILITY AUDIT

You also gave us an opportunity, when you were in Orange Beach, Alabama, last year—and I think the next lunch is my treat. So I look forward to getting you back—you were kind enough to agree with some of us who were saying, we need to have an audit, we need to have some fresh eyes look at the Gulf Coast claims fa-

cility that the administration—as you and I discussed—appointed Ken Feinberg to head this up. It was a \$20 billion fund that was set up. I think he has spent about \$6 billion of that at this point.

Can you give us an update on where the audit is, number one, and number two, do you believe that any moneys that are not committed out of that \$20 billion fund should be used to apply to any potential fines that BP might be facing as a result of these settlements or the trial?

Attorney General HOLDER. I think one of the really good outcomes of the meeting that we had, along with the Attorney General, was the desire that you both expressed for that independent audit. It is something that I had thought about but I was really struck by the strength with which you made those arguments, and then I came back and spoke to Tom Perrelli, who I think has done a great job and I am going to really miss him at the Department. He interacted with Mr. Feinberg, who agreed to that audit. That evaluation is in process. We want that to move as expeditiously as we can. But we also want it to be thorough and accurate. And I think that we will get something there. We picked a good auditor, the BDO Consulting Group, and I think they are going to do a good job. So we will see how that turns out.

And I am sorry, I don't remember the second question.

Mr. BONNER. Well, the second one was really kind of a follow-up to not only a status on the audit but also if you could—

DEEPWATER HORIZON SPILL FUND

Attorney General HOLDER. Now I remember.

We had the \$20 billion that BP put out. Now I am not sure where we are exactly with regard to how much of that money has been spent.

Mr. BONNER. About \$6.5 billion.

Attorney General HOLDER. I am not sure how much remains. But certainly that is something that I think would have to be a part of the conversation that we would have in terms of a potential settlement, how that money would be treated. But I could tell you that looking at the fines that we have on both the civil side and potentially on the criminal side as well, these are very substantial and they are justifiably substantial given the harm and given the conduct that we have examined. So how that remaining money will be factored in, if at all, is something that we have not discussed.

Mr. BONNER. I would remind you that the Vice President said that the \$20 billion account was a floor, not a ceiling. And we still believe, many of us still believe that Mr. Feinberg's process has been severely flawed. We look forward to the results of the audit, like you do. But there are still many businesses and individuals that are waiting, just hoping for—there was a story I believe in the *New York Times* the other day about a fisherman, a shrimper who had lost hundreds of thousands of dollars of business when the Gulf was shut down and was offered a \$25,000 settlement. His life has been destroyed. So I hope you will certainly encourage others, and we are going to miss Tom Perrelli, too. I want to give him a quick shout-out because he has been a star in helping us keep the pressure on Mr. Feinberg.

VOTING RIGHTS ACT, SECTION 5

But one last thing, Mr. Chairman, if I might. I want to shift gears briefly. There has been a lot in the news lately about section 5 of the Voting Rights Act. And I know this is shifting gears. But coming from a State where we can all admit that the sins of our fathers and grandfathers in the 1950s and 1960s required Congress at that time and the government to take action, and Congress in 2006 extended the Voting Rights Act, but my question to you is, section 5 of the Voting Rights Act applies to nine States and parts of seven others. Now if you or I go out to Safeway or Giant today and buy groceries or go to Sears and buy a battery for the car, more than likely if you pay with a check or with a credit card you are going to have to pull out your driver's license.

This is a two-part question. First of all, do you believe that section 5 of the Voting Rights Act is still constitutional? And do you believe, if it is, why shouldn't it apply to all 50 States? And then secondly, when you go cash your check and you pull out your driver's license, do you believe that States, like my State of Alabama, should have the opportunity to require photo ID when people go to vote?

Attorney General HOLDER. Yes. Taking those questions as they were asked, I think that it is still constitutional. When one looks at, as you mentioned, the 2006 reauthorization, Congress did a very good job in establishing the record for why the Act was still needed. It made some very serious factual findings that any court that would consider the constitutionality of the Act has to run head-long into.

Courts, as we understand them, don't make the factual findings in the first instance. They review factual findings that are made by the legislative body. And given the factual findings that Congress made with regard to the reauthorization, which passed overwhelmingly—it wasn't close. Maybe even unanimously in the Senate, I am not sure. We have made substantial progress on those issues in this Nation, no question. But from 2006 to now, I think the findings that Congress made are still valid. And why does it apply only to certain areas? It is because of the history that we found in those areas. That is the basis for the determination that section 5 should apply in those areas. But I think people should understand, it is not only southern States to which section 5 applies. There are northern States as well. And it all has to do with the conduct that was found there.

Mr. BONNER. Do you think it should apply to the whole country?

Attorney General HOLDER. No, I don't think so. Given the unique way in which we use section 5, which is to look back and find these past instances of inappropriate conduct, I think that is the thing that gives section 5 its continued vitality and its reason for existence. There were other parts of the Voting Rights Act, section 2, that allow you to do things on a nationwide basis where that specific finding has not been made.

With regard to the question of voter photo IDs, I think that too often people are neglecting a really important point: there are mechanisms in place. They are here in Washington, D.C. I can't just walk up to a voting booth and vote and just say that I am Eric

Holder and be allowed to vote. I have to come up with some way in which I prove who I am. And the mechanisms that we have had in place have proven to be effective. There is really no statistical indication that in-person voter fraud has to be cured by the introduction of these voter photo IDs. And if one looks at the negative impact of these photo ID laws and the harm that it has on minorities, young people, seniors, and the balancing that we have to do, I think we should think long and hard about whether or not these photo ID laws—aimed at curing a problem that I don't think necessarily exists but has a negative impact on the ability of people to get to the polls are a worthwhile policy initiative.

Mr. BONNER. I appreciate your answer. Mr. Chairman, I want to share this story with the Attorney General as I yield back my time.

My brother was a poll watcher for a friend of his who was running for county commission in our home county of Wilcox County, Alabama. It is a 70 percent minority county. This was an African American running for county commissioner. And my brother was sitting there watching as a young lady went in to get the ballot. He observed the fact that the person that she was claiming to be had already voted on the absentee list. Not only had she already voted, everyone snickered when she said that she was who she claimed to be. And then just out of curiosity, he went one step further. He went back and found that the lady who this young lady claimed to be, if she were still alive, would have been 107 years old. She had been dead for 35 years.

Now we can all give an instance of voter fraud and that doesn't excuse it and doesn't suggest that it is blanket. That would perhaps argue why section 5 should continue to apply. This is in Alabama. But I would say respectfully that in the opinion—at least of this Member—voting is a privilege, and people have worked and died for that privilege. We don't want to do anything to ever squash it. At the same time, I hope that as a country and certainly the Department of Justice is not going to turn a blind eye to legitimate cases of voter fraud that exist not just in the Deep South States and the other States where section 5 applies but throughout the country. We know from the last two presidential elections where—or not the last one but the two preceding that—where there were voter issues in Ohio and in California and in other States.

That was my point. I appreciate your answer. Thank you, Mr. Chairman.

Attorney General HOLDER. One thing I would say with respect is that voting is not, in fact, a privilege. It is a right. It is the lifeblood of our democracy. It is the thing that distinguishes us from so many other nations. And I want to assure you that when it comes to looking at voter fraud, it is something that this Department takes very seriously, and to the extent that we find it we will prosecute it. I am one of the few people who has actually prosecuted a voter fraud case successfully at trial; overturned on appeal for reasons I still disagree with the Third Circuit, but that is okay. And it is an example of what the Public Integrity Section of the Criminal Division at the Justice Department does as a section that prosecutes those instances of vote fraud when they are found.

Mr. WOLF. Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. I want to add that I certainly share my colleague's concern on voter fraud and think that we ought to do everything possible to combat it and prosecute those engaged in it. But I share the concern of many that the increasingly stringent requirements being enacted around the country are going to have the effect of disenfranchising people. And I think in terms of the numbers, they are likely to deter far more legitimate voters from being able to go vote than illegitimate voters. If somebody has been deceased for 35 years, they shouldn't be on the voter rolls. And I would think that you would want to start with culling out the voter rolls to make sure that they don't contain a lot of deceased voters. And that might be an efficacious way to at least to start to clean up some of the election problems.

But I share the conviction that this is a right. It is not really analogous to writing a check at the grocery store, which is not a right and to which there are alternatives. But there is no alternative if you don't have the opportunity to exercise your franchise.

INCARCERATION RATES IN THE UNITED STATES

I wanted to follow up on Mr. Fattah's question earlier about the declining crime rate. I thought it was very interesting in your response that you cited a number of things that were responsible for the decline in crime. And up until three years ago, I always used to say that we got too much credit, too much blame for the crime rate—we in law enforcement, we in Congress—and that the only consistent indicator was the economy. Well, you can't say that anymore, and it is fascinating to try to figure out why. What was interesting about your answer to me was, of all the factors you mentioned, incarceration wasn't one of them. In fact in some of the States, like New York, where they have looked at this, the rates went down most dramatically in crime at a time where incarceration rates also declined. So this gets me to something that leaps out about the budget this year, and that is that the budget is flat, slight decline in the budget for DOJ. But the area of overwhelming increase is Bureau of Prisons. So even with crime going down dramatically, prison construction costs are still going up and in fact when the two prisons which that helps fund are completed, the system is still going to be 40 percent over capacity. We see this in California where we are forced to release people in a less than organized way as a result of court order. And the Federal Government is heading in the same direction. I mean, if we continue we are going to be facing a court ordered depopulation of our prisons. All this I think raises a very important issue, which is the number of people in prison in America would be like the 51st State if they were a State. It is a huge number. And I bear my own responsibility for that. I have advocated for tougher sentences. And in the case of violent and sex-oriented offenses, I think they are fully justified. But I do think we need to step back and think about where we are headed. You and I have talked about this before and about Senator Webb's legislation. It would establish a crime commission. It is something that I am very interested in pursuing in the House and I know my colleague Jan Schakowsky shares that interest and I know our chairman has been very active on prison issues.

Can you share a little of your thoughts about how we can, in a thoughtful way, attack this problem of so many people incarcerated? It is bankrupting the States, and our Federal Government is having to cut back on everything else as a result. The incredible number of people with substance abuse problems incarcerated, the disproportionate number of minorities incarcerated, where do we begin to tackle this problem?

Attorney General HOLDER. Well, I think that Chairman Wolf is actually a very forward-thinking person in this regard, and I think you were right to mention him. And it has really been interesting. If you look at some of the studies that have been done in Texas, in New York, where the incarceration rates are going down, and crime is going down as well, there is not necessarily a lockstep notion in increasing rates of incarceration and decreasing levels of crime. The question is, who are we putting in jail, for what, and for how long? There are people who need to go to jail. There are people who need to go to jail for extended periods of time. But there are also people who need to go to jail maybe not as long, perhaps, as we put them in jail, and who need to be rehabilitated once they are put in jail. They come in with all kinds of educational, vocational, health deficiencies that we somehow have to deal with. And to the extent that we can, we can perhaps change recidivism rates. I was really fascinated by a Texas study that showed for a relatively small reduction in the amount of time that somebody spent in jail—I think a month, something like that—that if you told a prison that and you told the prisoner you would get out a month earlier if you will engage in a vocational program, if you will engage in a drug rehabilitation program, an educational program, they signed up in droves. The recidivism rate went way down. And you are only talking about reducing their amount of time in jail by a relatively small amount, which at the end of the day is really cost effective. One of the things that we have talked about is reducing time in jail by seven days or something like that in the Federal Bureau of Prisons, which would save us about \$40 million over the course of a year.

So I think all of those things have to be considered. But I also think it is time for us to have a dialogue. I think what you said about the Webb approach or something similar to that would be really worthwhile. We put in place a lot of policies in the 1980s that I think we ought to review. Some of them are good and have continued vitality. Others I think were mistaken in their approaches. And I think we ought to have a dialogue, a conversation about that. I think that would be a good idea.

SENTENCING COMMISSION

Mr. SCHIFF. Now is this supposed to be what the Sentencing Commission already does? How would this differ from what the Sentencing Commission does? Now obviously their jurisdiction is Federal and this is beyond a Federal Government problem. But how do you see a commission or analysis faring from what they do?

Attorney General HOLDER. Yeah. I think the Sentencing Commission is constrained in a couple of ways. First, it is really only dealing with the Federal system and it is really looking at existing law and how you can—this is not a good word—but how you can

tinker with it. And I think we really need to open this up and have a larger conversation about how we deal with people. So much of our criminal population is fueled by people who are involved in drugs. The sale of drugs, the use of drugs, people who commit crimes trying to support habits. How do we deal with that most effectively? I think we need to ask larger questions and include in that analysis what happens on the State level as well, which is something that the Sentencing Commission is really not empowered to do. But I also think it involves the executive branch of the Federal Government, and the legislative branch along with our State partners. From my perspective, a commission, a body that included all those groups, would make a lot of sense.

Mr. SCHIFF. My guess is that you could increase the sentences for violent and sex offenders probably by a third if you reduced the sentences of nonviolent offenders and drug users by the same amount. And you would have probably a lot of prison space left open and reduced costs. And I think that is probably a trade that the American people would embrace, taking the violent and sex offenders off the street for a longer period of time at the price of having shorter sentences for nonviolent offenders. But I look forward to working with you on the commission approach or whatever we can do to think about the big picture because just as we are trying now to think about the big picture about our Federal budget and some of the trends that have led us to where we are, I think we need to think big picture in terms of incarceration as well.

DNA PROGRAMS

Let me turn to one other area, speaking of the violent and sex offenders, and that is the area of DNA. A couple of questions: One is that the budget would propose to fund the DNA programs in part or in whole out of the victims compensation fund. That will be controversial. Can you share your thinking on that? And also there has been a lot of concern and criticism about how the Debbie Smith funds have been allocated, that they are going to things that are quite divorced from backlog reduction at a time when still a lot of States are really fighting to get through their backlogs.

Is there an effort to provide greater focus to the Debbie Smith resources so they, in fact, go to backlog reduction and not unrelated efforts?

Attorney General HOLDER. I think first, with regard to the use of the Crime Victims Fund, one of the things that we have done in a number of areas is to come up with ways in which we can tap into that. The fund has substantial amounts of money going into it, and we could use that money for purposes that are related to people who are, in fact, victims, expanding the notion of who victims are without doing any harm to those programs that have traditionally been funded by the fund. And that is one of the things that we have proposed.

In terms of assisting State, local, and tribal governments, the Department is requesting \$107.3 million for DNA programs in 2013. The Nation's crime labs have kept pace with new submissions, but they have real problems with this backlog of old kits that exist and trying to work your way through those. The Federal Government has done a pretty good job in eliminating the backlog that we have.

We are looking at now about a 30-day turnaround time from the time samples are received until they are uploaded to the DNA database. But I think dealing with that State backlog is a continuing problem that frankly we have not really done as good a job on as I think we could have.

Mr. SCHIFF. Mr. Attorney General, I think using funds to reduce, for example, the rape kit backlogs in place around the country is a very appropriate use of a victims compensation fund. These are victims of rape and these funds can help take the perpetrators off the street. Those victims live in fear that the rapist will come back. So I think that is a perfectly appropriate use.

The two questions are related. If use of the Debbie Smith funds is focused on backlog reduction, I think there is a powerful case to make.

FAMILIAL DNA

One last comment. And once again, thank you for the superb work you and the Department are doing. You make us very proud. I would love to follow up with you on the familial DNA issue. I have introduced legislation on it and would love to get the Department's feedback. You and the director of the FBI have made supportive statements of the concept of familial DNA which we have seen so powerfully effective in California. And Chairman Smith of the Judiciary Committee has planned a hearing on the subject of familial DNA. So we would love to get your support for the legislation.

Attorney General HOLDER. Yes. I think that the time has come for us to have a conversation about that. It is a potentially extremely effective tool. There are issues that I understand people have about it. But I think, again, dialogue about that issue, research into how it might appropriately be used is something that we need to be talking about. We are seeing cases where it is being used and where long-time unsolvable cases are being solved and that promotes public safety, holds people accountable, and it is a tool that I think we need to have further discussion about. But I think it is something that—again, trying to work our way through all the concerns—I think we are ultimately going to be using much more frequently than we do now.

Mr. SCHIFF. Thank you. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Graves.

Mr. GRAVES. Thank you, Mr. Chairman.

Attorney General, thank you for being here today. In your opening statement you note—you said, and I am going to quote it. It says, "[the Department of Justice is] responsible for enforcing the law, and those efforts must be funded." And I agree with that statement. I was curious though, where do you draw the line between enforcing the law and defending the law?

Attorney General HOLDER. Well, the Department has a unique responsibility in defending Federal statutes. It is something that we do as a matter of routine unless, in rare instances, we make the determination that there is not a basis for defending a statute. So there is that. That is one thing that we do in the Department of Justice and then obviously carrying out the laws that Congress

gives to us and using those as tools in the work that the American people expect us to do.

DEFENSE OF MARRIAGE ACT

Mr. GRAVES. In regards to the Defense of Marriage Act your Department made—and you specifically, according to your letter—I guess the determination that it was unconstitutional, section 3. Can you explain to us your rationale, your determination of what is unconstitutional and what is not?

Attorney General HOLDER. Sure. The Department up until the time I made that determination was defending the Defense of Marriage Act where there was precedent in a number of circuits. We were presented with a unique situation in the Second Circuit where there was not a precedent with regard to DOMA. And so we looked at it afresh and made the determination that, given the history of discrimination that gays and lesbians had suffered over the years, a heightened level of scrutiny was appropriate. In applying that heightened level of scrutiny we did not think that the statute passed constitutional muster, and it was only as a result of getting into that Second Circuit case that we changed the position that we had taken previously when we were defending DOMA in a variety of other places.

Mr. GRAVES. So in essence, without a court ruling you unilaterally determine what is constitutional and what is not, or your Department reached that. Let me continue on.

BIRTH CONTROL

The First Amendment—and I am going to read it—it says, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” I will continue on in the same vein. In your opinion, does that apply to the rules and regulations in the same respect as—does that same protection apply from agencies of the Federal Government?

Attorney General HOLDER. That agencies should not be promulgating religious—

Mr. GRAVES. Rules and regulations that would violate the First Amendment.

Attorney General HOLDER. Yes.

Mr. GRAVES. So the recent ruling—and there are many who would claim that there is a—or the rule that came from the Department of Health and Human Services in regards to mandates, which many would say is a violation of religious liberties in the First Amendment, is your Department going to defend that rule or not defend that rule?

Attorney General HOLDER. Well, I think I would respectfully disagree in the sense that I don’t think that the rule that HHS promulgated was one that ran counter to the religious prohibitions that are contained in the First Amendment. And that is especially true, I think, when one looks at the compromise that the President and Secretary Sebelius put in place. And to the extent that that action is challenged in court, I would expect that the Justice Department would defend what is in place, which would be that compromise.

Mr. GRAVES. So it would defend the agency or defend the ruling?

Attorney General HOLDER. Yes. I am not sure exactly who would sue. But my guess would be that we would be in defense of that compromise.

BACKGROUND CHECKS FOR GUN REGISTRATION

Mr. GRAVES. Okay. And then one other question. This is a major shift. Since the 1990s, Congress has had a lot of legislation that has been prohibiting imposing any fees for the operation of the Brady background check system. So for 10 years, we have required the destruction of the records within 24 hours, but the administration now is proposing deleting that section from the fiscal year 2012 language that makes those restrictions apply in future years or removes that restriction. Why is that? And does the administration plan to impose a fee and seek longer record retention on background checks?

Attorney General HOLDER. I will have to get back to you with regard to the fee. I am just not familiar with that—and I will give you a written response to that. I think that with regard to the retention of records, I am again not familiar with exactly what the proposal is. But I think that one of the things that certainly as a law enforcement officer I always want to have is the ability to look at what is potential evidence in a crime. And the retention of records—again, I don't know exactly how long we are talking about—always helps in—potentially helps in the solving of crimes. So that I think would certainly be the thing that would probably be the basis for such a proposal.

[The information follows:]

GUN FEES PROVISION

The National Instant Criminal Background Check System, or NICS, general provision (Section 508 in the FY 2013 President's Budget) prohibits the charging of fees for firearms background checks and requires the destruction of federal firearms applications within 24 hours of the system notifying the seller that the purchaser is not a prohibited possessor. There is *no* proposal in FY 2013 to impose a fee or lift the 24-hour destruction requirement related to background check records.

The FY 2013 President's Budget merely proposes to delete the term "hereafter" in the NICS provision. Since the NICS provision is repeated every year, the Administration has determined that the futurity language is unnecessary. The underlying provision remains in effect, by virtue of its inclusion every year, and the Administration has no plans to modify or discontinue it.

Mr. GRAVES. Well, I think currently as it is, if one were to apply for a concealed carry permit or goes through a background check and they are checked out and everything is fine, then within 24 hours those records are destroyed on that individual. So the question really is, is there an anticipated request to seek a longer retention period and attach fees to that? Additional fees?

Attorney General HOLDER. I was just checking to make sure it was accurate. I am not sure that we are asking for an expansion of that retention period. We can look at that to see if we had somehow missed something. I don't think we are asking for that.

Mr. GRAVES. And the reason for the question is that the administration has requested striking some of that language. So it is just looking ahead. What is the plan in moving forward? But thank you.

Attorney General HOLDER. Okay, Congressman. I will look at that and get you a written response. Because frankly—and I apologize—I am just not as familiar with that as perhaps I should be.

Mr. GRAVES. I thank the gentleman. Thank you, Mr. Chairman.
Mr. WOLF. Mr. Honda.

Mr. HONDA. Thank you, Mr. Chairman. And again, good seeing you again, General Holder.

BP OIL SPILL

There have been many reports—well, first, let me say your report in your testimony is really great because it has covered a lot of areas that sometimes we don't even think about. And I appreciate your work on the mortgage foreclosures and doing the work in the area of BP and the oil spill. Just quickly with the oil spill and the audit, does that include also the other areas where BP had been drilling, using the same techniques? We are looking at the other areas where there are potential spills that could be repeated because I think that they have quite a few other drilling areas in which they used the same technique. Does the audit cover that arena?

Attorney General HOLDER. Well, the audit is really designed to look at the way in which the organization that Mr. Feinberg heads is actually interacting with people who are making claims and then how he is dealing with those claims. That is really the purpose of the audit.

Mr. HONDA. Are there any thoughts by the Department to look at the other sites that have been using the same techniques where you had the spill?

Attorney General HOLDER. Yes. See, I actually think that if there is a potential settlement, that should be one of the things that would be a part of it. Now again, I am not saying that we are in settlement conversations or what we would do down the road. But from my own perspective, that should be one of the things that we consider, to come up with ways in which we deal with the harm that was done but also think about preventive measures so that we don't deal with this problem 5, 10, 15 years from now. The magnitude of this issue, as Congressman Bonner said, is unprecedented. And we have to put in place mechanisms so that we don't have this issue again.

NYPD AND CIA MONITORING OF MUSLIM COMMUNITIES

Mr. HONDA. Well, I agree with my friend Mr. Bonner. In the area of civil rights, I have understood that New York City and the New York City Police Department and the CIA have engaged in overly broad and discriminatory efforts to collect information on Muslim Americans and the Muslim community without the establishment of reasonable suspicion. And it seems to be outside the scope of joint operation agreements. What is your judgment on the kinds of activities that these two agencies appear to be or are accused of participating in in terms of using rakers and other informants going into mosques and other places like that to retrieve information without any apparent overt behavior by these communities?

Attorney General HOLDER. We have received letters from Members of Congress, from other sources as well, and we are in the process of reviewing those letters to determine what action, if any, we should take. From my own perspective, we have made a great deal of effort in the Justice Department and in the Federal Govern-

ment to do outreach efforts to these affected communities and have had great success there, developed great relationships that provide information to us. I would say that as a general matter, before one takes investigative action, that there should be a predicate of some sort, some basis or belief that that action is necessary.

Again, I am not commenting on the issues in New York because I am frankly just not familiar with how the program was set up. But law enforcement, to the extent that it is monitoring people's activities, I think should only do so when there is a basis to believe that something inappropriate is occurring or potentially could occur. And that is why I use the term "predicate."

Mr. HONDA. Well, I am not sure what the predicate would be. Is it a court order? Is it court permission?

Attorney General HOLDER. No. It doesn't have to be something that is sanctioned by a court. We have rules within the Justice Department, Attorney General guidelines that guide the way—or mandate the way—in which our investigative agencies conduct themselves but in particular, the FBI as it is dealing in its intelligence investigations. And I think those rules, those regulations, do a good job of striking a balance between making sure that we are as effective as we can be while at the same time restricting the vast power, the vast investigative power that we have and make sure that we only use it in appropriate ways.

GPS TRACKING BY THE FBI

Mr. HONDA. There was an incident in my district where a young college student found a device under his car. It was a GPS tracker. And when he did the research, he found out it was a GPS tracker and put it out on the Internet and the FBI came a couple days later to claim it. They reclaimed it without explanation. What reason or what rationale would the FBI be using to track a student and then progressively and continuously monitoring this person's movement and behavior?

Attorney General HOLDER. I am not familiar with the facts of that case. Perhaps we can look at that and, to the extent that we can, share information about what the predicate might have been in that matter. I would hope—again, looking at the Attorney General guidelines, the restrictions that are in place—that there was a basis for doing the action that you have described. I am just not familiar with it, but I will try to look into it.

[The information follows:]

GPS TRACKING CASE

As reflected in the attached response to Congressman Eshoo (you were copied), the installation of a Global Positioning System (GPS) tracking device is an investigative technique that may be used during a predicated investigation authorized by the Attorney General's Guidelines for Domestic FBI Operations. These Guidelines provide that FBI investigations may be initiated to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence. An investigation may not be initiated based solely on race, ethnicity, national origin, religion or the exercise of First Amendment protected activities.

Also, as stated in the attached response, the FBI understands the importance of having strong relationships with Muslim and Arab-American communities and invests significant time and energy in developing and maintaining those relationships. The FBI's outreach efforts range from formal national-level relationships with estab-

lished groups to local individual relationships established by personnel in the field with leaders in their local communities.

[The information follows:]

**U.S. Department of Justice****Federal Bureau of Investigation**

Washington, D.C. 20535

November 17, 2010

The Honorable Anna G. Eshoo
United States House Of Representatives
Washington, DC 20515

Dear Representative Eshoo:

This is in response to your letter to Director Mueller, dated October 19, 2010, seeking information concerning the FBI's use of "GPS trackers," the appropriateness of their use in a reported discovery by Mr. Yaser Afifi, and specific outreach efforts to the Muslim American community concerning the protection of civil liberties. Identical responses will be sent to Representatives Lofgren and Honda who joined in your inquiry.

The FBI obtains judicial authorization for installation, use or monitoring of Global Positioning System (GPS) devices whenever required by law. As a general rule, a court order is not necessary for installation of a GPS device when no physical trespass is necessary to install the device. Likewise, when the GPS device does not infringe upon a reasonable expectation of privacy, no search warrant is necessary. FBI policy requires that the determination of whether a reasonable expectation of privacy exists in any given circumstance - and thus whether a court order is required - be made by attorneys in our Field Office or within the Office of General Counsel at FBI Headquarters. The determination of whether legal process is necessary in a given situation depends upon the facts and relevant law, i.e., the location of the vehicle at the time of installation, the manner in which the GPS is installed, the data produced by the GPS, and the particular case law of the circuit or district where the device will be used.

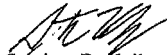
The installation of GPS tracking devices is an investigative technique that may be utilized during a predicated investigation authorized by the Attorney General's Guidelines for Domestic FBI Operations. These Guidelines provide that FBI investigations may be initiated to detect, obtain information about, or prevent or protect against federal crimes or threats to the national security or to collect foreign intelligence. An investigation may not be initiated based solely on race, ethnicity, national origin, religion or the exercise of First Amendment protected activities.

As I hope you can appreciate, it would be impossible to discuss whether use of an investigative technique in any specific instance was appropriate without in fact confirming the existence of an underlying FBI investigation. As a matter of policy, the FBI does not confirm or deny the existence of investigations.

Your letter also requests information concerning the FBI's outreach efforts to Muslim American communities to assure that civil liberties are being protected. The FBI understands the importance of having strong relationships with Muslim and Arab-American communities and invests significant time and energy in developing and maintaining those relationships. Our outreach efforts range from formal national-level relationships with established groups, to local multi-cultural advisory boards, Citizens' Academies and youth activities. Most important are the individual relationships established by personnel in the field with leaders in their local communities. Protecting civil liberties is central to the FBI's mission and through these relationships, we encourage community leaders and members to report any hate crime, violation of federal civil rights or suspicious activity to the FBI.

We appreciate your continued interest in the operations and mission of the FBI. Should you have any additional questions, please contact the my office at 202-434-5051.

Sincerely yours,



Stephen D. Kelly
Assistant Director
Office of Congressional Affairs

- 1 - The Honorable Zoe Lofgren
United States House of Representatives
- 1 - The Honorable Mike Honda
United States House of Representatives

U. S. House of Representatives
Washington, D. C. 20515

October 19, 2010

The Honorable Robert J. Mueller, Director
 Federal Bureau of Investigation
 935 Pennsylvania Avenue, N.W.
 Washington, DC 20535

Dear Director Mueller,

Earlier this month, it was reported that Yaser Afifi, a 20-year-old from Santa Clara, California, discovered an unknown device under his car during routine maintenance. After he removed the device, a friend posted pictures of it on an Internet news site where it was identified as a GPS tracker. Several days later, Afifi was apparently visited by FBI agents, who acknowledged that the Bureau had placed the device and demanded its return.

While the U.S. Court of Appeals for the Ninth Circuit has ruled that the government does not need a search warrant in order to track a person's movements using a GPS device, other courts have disagreed, and the law is far from settled. In any case, we believe that the warrantless use of such devices raises serious constitutional and privacy concerns. We therefore request written responses to the following questions:

- As a matter of policy, does the FBI obtain search warrants for the installation of GPS devices on the vehicles of persons under investigation? Does this policy vary by locality or jurisdiction?
- In testimony before the Senate Judiciary Committee on July 28th of this year, you affirmed that FBI guidelines require "suspicion of wrongdoing" to initiate surveillance of an individual. What specific standard of suspicion is required for the use of GPS tracking devices?
- Upon what specific statutory authority does the FBI rely in using such devices to conduct surveillance?

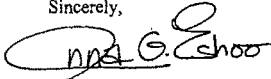
We appreciate the Bureau's efforts to combat domestic terrorism, but we're also concerned that without careful civil liberties protections, such efforts can be perceived as ethnic profiling. The vast majority of the Muslim American community neither engages in nor condones terrorism. Community members are often excellent sources of voluntary information about potential terrorists. Their contacts with family members and colleagues in the Middle East should not automatically subject them to surveillance. Perceptions of targeting based on ethnicity can reduce a community's willingness to cooperate with the authorities, hurting our efforts to combat serious threats.

The FBI's Domestic Investigations and Operations Guide states that an investigation may not be based "solely on Constitutionally-protected conduct or on race, ethnicity, nationality or religion." We ask that you review Mr. Afifi's case to determine whether appropriate civil liberties safeguards and other investigative guidelines were followed.

Finally, we would like to know what outreach efforts the FBI is making to the Muslim American community in the area to assure community leaders and others that their civil rights are being protected, not violated, by the federal government.

We look forward to your prompt reply in this serious matter and thank you in advance for it.

Sincerely,



Anna G. Eshoo
Member of Congress



Zoe Lofgren
Member of Congress



Mike Honda
Member of Congress

Mr. HONDA. Yes. We wrote a letter and we have asked that someone look into that. The overall reaction and the overall reaction of the community is one of suppression. And it just doesn't make the community feel very comfortable. And it seems to me that this is one of the ways that al-Qaeda types would recruit young people based upon these kinds of behavior on behalf of our government. My community in the 1930s and 1940s have experienced that. But we didn't really understand its overall impact until World War II started. And I just think that we need to be a little bit more diligent in the way we do things. And if it comes to light, then some explanation needs to be done, especially in a democracy like ours, where we demand transparency and accountability.

Attorney General HOLDER. Well, I think you actually raise an important point and that is in performing these law enforcement functions, we have to take into account cost-benefit. What is it that we will gain? What is the potential price that you pay? You do not want to alienate a community, a group of people so that—especially impressionable young people—think that their government is against them. And then you know the siren song that they hear from people who they can access on the Internet becomes something that becomes more persuasive to them. I will say that going forward with regard to this whole question of the GPS tracking and in light of the Supreme Court decision, you have to obtain a warrant now in order to do that. And we are in the process of issuing guidelines to the U.S. Attorneys' Offices and to FBI offices as well. Again, given I think it was the *Jones* case—the recent Supreme Court case about the use of these trackers. So going forward, there are guidelines, more specific guidelines about the use of those devices.

Mr. DICKS. Would the gentleman yield just briefly just for a second to clarify? Are you saying that before that they could put this GPS tracker on without a warrant? They just put it on?

Attorney General HOLDER. Yeah. I mean that was—

Mr. DICKS. Didn't they have to have probable cause? Would there be any standard met here?

Attorney General HOLDER. There were certainly internal guidelines that had to be met in order to do that, but there was not the requirement that a court order be obtained. That case went to the Supreme Court and the Court decided that given the nature of the act, that a warrant was required.

Mr. DICKS. Thank you, Mr. Honda.

Mr. HONDA. Thank you for the clarification. Because I don't think that was the situation in this case. It happened a few months ago.

NYPD MONITORING OF MUSLIM COMMUNITIES

And in terms of the White House drug enforcement spending programs, I understand that Federal funds were used by the New York Police Department in order for them to be able to spy or infiltrate into the Muslim mosques and the communities. Is that true? Or is that proper use of those funds?

Attorney General HOLDER. I just don't know at this point. As I said, our examination of this has been limited at least at this point to the letters that have come in. We are only beginning our review.

I don't know if Federal funds were used. I don't know even if the program, as it has been described in the news media, was an appropriate way to proceed, or was consistent with the way in which the Federal Government would have done these things. I simply just don't know the answers to those questions at the beginning stages of this matter.

Mr. HONDA. So you are indicating that you are going to be looking into it and are going to be pursuing that question?

Attorney General HOLDER. Well, we are reviewing, as I said, the letters that we have received and on the basis of that review we will decide what action, if any, we should be taking.

Mr. HONDA. And if you would keep us informed, I will appreciate that. And I have confidence in the integrity of the Department. I will follow through with that.

Attorney General HOLDER. It is something that we have tried to stress in our Civil Rights Division. I think there are 18 investigations now, perhaps 17 investigations now into the conduct of police departments around the country and the way they interact with the people that they are sworn to serve. So we have not shied away from doing those kinds of investigations. I am not saying that that will be something we will be doing here. But if we think there is a basis for it, we will do that.

Mr. HONDA. Thank you.

Mr. WOLF. Mr. Yoder.

Mr. YODER. Thank you, Mr. Chairman. General Holder, thank you for being here today. I know you have been on the Hill a few times in the last few months and have gotten to know many Members of Congress well. So we know that you have got a lot of things to do and we appreciate that you are here again this morning.

FISCAL YEAR 2013 BUDGET

Our top priority—at least my top priority on this committee—is to try to figure out ways to find savings to try to get this budget back in balance. I am a new Member in Congress. Several of us are new Members here. And many, many Americans are very concerned about the spending in the Federal Government and asking us consistently when we go back for town halls, what are you doing to root out waste? It should be a goal of everybody in this city is how do we find wasteful programs? How do we eliminate programs that may be ineffective? And how do we get the budget back in balance? I noticed that you were able to reduce your budget from \$27.2 billion to \$27.1 billion, a 0.4 percent reduction, which is notable but is certainly not going to get the job done that we need to try to balance the Federal budget. If we did a 0.4 percent across-the-board cut, we wouldn't really get very far. We borrow about \$4 billion a day. By some estimates, \$40,000 a second. So it would be interesting to note how much we borrow just in the discussion of your budget. It is pretty easy to see how we go backwards pretty quickly.

So as I do my job and my colleagues, as we do our jobs of trying to find where to reduce spending, the things that come to my mind first are programs or departments in which I have concerns about the effectiveness of the management of the Department. I am sure you would do the same thing if you were sitting at our table, you

would find which managers are least effective and figure out a way to eliminate programs. And it is no secret that many Members of Congress are very concerned about some of the programs that you have engaged in, particularly one that has caused you to spend a lot of time on the Hill, and that is the Fast and Furious program. And I would note that if we were here several years ago, that might have been a program we could have eliminated to save money, as that includes one that I think you have stated that it is not something that you knew anything about, it is something that you don't support.

So I guess as we go through this dialogue about finding ways to reduce programs and save money, what are other programs that you are aware of that might be also causing similar mischief or are unaccountable to you that you could do a better job in finding them more accountable? That is the first thought in terms of how this relates to our job here to save money.

The second thing though is, I am troubled and I have a confidence issue, Mr. General, in the leadership and the management of the Department because of your response to this one particular incident. I don't have a lot of experience following you every day related to every program but this has gotten enough attention—I have watched lots of the testimony. And as a new Member, I go home and people say, what are you doing to hold the administration accountable? In particular, people ask me—you need to be aware that many people ask us what we are doing to hold the Department of Justice accountable for that horrible tragedy. And so I guess help me gain confidence because I have been very concerned that the response from the agency has been, one, we didn't know about it so how can I be accountable? I didn't know it was happening, which seems to be a little bit of a pretty bad effort to not take responsibility. I mean you are the manager of the Department. And then two, I have been also troubled that you haven't held others accountable for the incidents. And I know you have had a lot of questions on this. I am not going to ask a unique question you haven't had a chance to answer. But I would like to hear how I explain to my constituents who say, "We sent you up there to be a voice, to be a strong voice for our district. And this General, he is not taking accountability for his own department. You are supposed to be cutting spending. Why aren't you cutting some of your own programs?" So I am trying to find things that might be similar to cut here and also trying to find out how I can be responsive to my constituents who say that we are not doing a tough enough job of holding you accountable for what appears to be a failure of leadership.

FISCAL YEAR 2013 BUDGET PROGRAM REDUCTIONS

Attorney General HOLDER. Let me first deal with the question of reductions. Our budget proposes \$647 million in savings and efficiencies. And a 0.4 percent reduction might not seem significant, except when you take into account among other things the rising costs that we have to deal with with regard to the Bureau of Prisons, where we still have, even with the budget that we have proposed, about a 39, 40 percent overcrowding rate. That concerns me a great deal with regard to the safety of the guards who are there,

and the safety of the prisoners as well. So that when we have these costs that are going up and of which we have little or no control, we are still at the point where we are keeping the budget flat. So in essence we are doing an efficient job there.

My responsibility as Attorney General is to try to identify those areas where, given the budget situation that our Nation is facing, we can come up with budget cuts. We have saved \$214 million in operational costs, as we have reduced office space, rent costs, better pricing on technology contracts, we have smarter travel regulations that are in place. These are all the little things that kind of add up. So we are trying to be responsible. And that I think you could share with your constituents.

OPERATION FAST AND FURIOUS

When it comes to Fast and Furious, I think that what I would say is that I have not shied away from the fact that I am ultimately responsible for everything that happens in the United States Department of Justice. But one has to look at my response to Fast and Furious once it came to my attention. I ordered that the practices that were involved in that unfortunate operation be stopped. I ordered that an investigation occur. Personnel changes have been made. Reforms have been put in place at ATF. And we will see from the Inspector General investigation that I ordered—we will have a more fulsome look at exactly what happened in Fast and Furious. And I am prepared to take other actions as well, though I understand my responsibility, and will not shy from it, to take action before the Inspector General finishes her report if I find a basis for that.

Mr. YODER. Mr. Attorney General, if I might interject. Do you believe the program was a mistake?

Attorney General HOLDER. I think that it was a bad attempt at trying to deal with a very pernicious problem where guns are flowing from the United States to Mexico. In its execution, and in its conception, it was fundamentally flawed. But I understand what they were trying to do but they just did it extremely, extremely poorly.

Mr. YODER. And if you had a chance to do it over again to continue the program, would you have eliminated it before they proceeded?

Attorney General HOLDER. I certainly would have modified the program. I mean, allowing guns to walk is simply a procedure that just does not make sense. It is bad law enforcement, and I think that is at the heart of the problem with regard to Fast and Furious. On the other hand, in coming up with ways in which we stop the flow of guns from the United States to Mexico, we need to be aggressive. We need to be creative. And we need to help our Mexican counterparts to the extent that we can.

OPERATION FAST AND FURIOUS—BILL LANGUAGE

Mr. YODER. The other challenge that I think—and while we are on this issue, I would just note in the budget and why this is relevant is there is language in the budget. It was in the appropriations bill that passed that the Department of Justice is asking to be stricken. That is on page 811 of the budget, section 219. That

language says, "None of the funds made available under this Act . . . may be used by a Federal law enforcement officer to facilitate the transfer of an operable firearm to an individual if the Federal law enforcement officer knows or suspects that the individual is an agent of a drug cartel, unless law enforcement personnel of the United States continuously monitor or control the firearm at all times."

One question I have is, why does the administration want to eliminate that language?

Attorney General HOLDER. As I understand it, that is an amendment that was put in by Senator Cornyn.

Mr. YODER. 99-0 in the Senate.

Attorney General HOLDER. And I think that is consistent with our policy. I am not sure that we are opposing it. To the extent we are opposing it—I guess to the extent we are opposing it, it is only because that is already the policy that we use. So it is something that is unnecessary. So that would be the basis for any opposition that we have.

Mr. YODER. Do you understand why Members on the Hill may not believe you are following the policy that you have internally considering what just happened?

Attorney General HOLDER. Frankly, no, I don't understand that. Given the action that I have taken—you know there is a certain amount of distrust. I get that. There is a certain amount of partisan wrangling that is going on. But given the serious nature of this controversy, it would be my hope that we could have conversations—as frankly as we are having here. This is very interesting. I am having a conversation about Fast and Furious in a very appropriate, neutral, detached way which is fundamentally different from my experiences in other committees. And this is almost—I won't say pleasant, but it is different.

Mr. YODER. Am I not doing my job? I am just kidding.

Mr. DICKS. Would the gentleman yield just briefly?

Mr. YODER. Sure. I would be happy to yield.

Mr. DICKS. I was unaware that this program, Operation Wide Receiver, which was part of Fast and Furious, started in 2006 and was continued into 2007. And some of the most serious things that happened were—in the midst of these operations, Attorney General Michael Mukasey received a briefing paper on November 16, 2007, in preparation for a meeting with the Mexican Attorney General. It stated that the ATF would like to expand the possibility of such joint investigations and controlled deliveries. I think it is important for the American people to understand that this started in the previous administration and that the ATF was not candid with the leaders of the previous administration about this program. In fact, it was stopped at one point but they went ahead and kept making sales to these people in order to try to get a bigger fish. So I just wanted to point that out so we could have a fair description of what has happened here.

Mr. YODER. And to the gentleman's point, the point I am getting at is that back in 2006, there was awareness that these things were going on and yet we continued to fund the program. So as a new member on appropriations, I am saying, when we are doing our work here trying to figure out how to solve this horrific na-

tional debt crisis we are facing—well, first of all, let's start with stopping funding programs like this, that it looks like there is bipartisan agreement, or bad programs that have put you in a horrible light. And many of us, myself included, have lost confidence. I am being frank with you, sir. We have lost confidence in the management of the Department. And the only thing I would say regarding your response that gives me trouble still is there is a sense that the concerns that are being raised on the Hill are illegitimate. This language was put in with a 99-0—I am just saying, that is how it appears to me, sir. That the language that we put in 99-0 in the Senate—rather than, say, “you know I could understand given what happened why Members on the Hill would want some additional language in there.” Rather, it is, “Well, that is redundant, and I don't know why you are concerned about that.” And I just wanted to tell you, as someone who has observed these hearings, I think that there has been a disservice to your argument in that you haven't embraced the rationale that many people in our districts, our constituents are upset, and they come to us and say, “Why are you letting this continue?” So you have to understand, this isn't just something that got dreamt up in an office from a Congressman. This is coming from real Americans who are outraged that their Federal Government is allowing this to happen. So to the extent that there is any dismissiveness of this from the Department of Justice, it fuels the rage and drives the concern greater. It continues on. So my advice is—if you want to continue to make your other programs effective is to find a way to better acknowledge these things and I just believe removing language that was passed 99-0 that just gives Congress a level of comfort. Clearly you weren't following your own policies. That is admitted because guns were being given to folks and they weren't being monitored. That is a conceded fact. That this language is just something that gives Congress more faith that they are doing their part to try to be engaged in oversight and making sure dollars are spent effectively.

So I just caution you, sir, by removing things like this, it lends credence to my belief that there is a wanton disregard for the seriousness of what has occurred.

Mr. FATTAH. If the gentleman would yield for one second.

Mr. YODER. Could I have the Attorney General respond to my point?

Attorney General HOLDER. Sure. Please don't take my comments here or any of the comments I have made in any of the six or seven hearings I have had or occasions I have had to talk about this before other committees as questioning the legitimacy of the questions that have been raised. I mean, there are some very legitimate questions that you are raising and others in other settings have raised.

That was a fundamentally flawed program. Fundamentally flawed. And I think that I can actually agree with some of my harshest critics that there are legitimate issues that need to be explored with regard to the way in which Fast and Furious was carried out. I have never tried to defend the program. What has bothered me is that we have taken something that we actually share, where we actually share a concern, and it has gone from that and

mushroomed into the political sphere, where people ask for resignations, where I am threatened with contempt or something like that, in spite of the fact that we are trying to provide documents, and a whole variety of things that flow from that. But at its core, I tend to agree with you that the questions that you are asking today and the questions that other people have asked are legitimate ones.

But I think one thing that also has to be understood is that once this was brought to my attention, I stopped it. I stopped it. In spite of what other attorneys general might have done with briefings that they got, when this Attorney General heard about these practices, I said to the men and women of the United States Department of Justice, to the field, to people at main Justice, this ain't going to be the way we conduct business; stop it.

Mr. YODER. I have just a limited second here, I would like to just ask one unrelated question. We can probably do this all day. I know you have felt like you have done it all day at certain times. So I will move on.

PRISON COSTS/RECIDIVISM

I just want to say the conversation you had on the other side of the table regarding prison costs, and you mentioned that in your comments related to the increase in your budget, I encourage you to look at States like Kansas, where I am from, that have shown some real progress in reducing prison costs through strong and supportive reentry programs and really working to reduce recidivism rates. I think there is a real benefit there. I know you have mentioned that in your testimony. Kansas has a good model. There are other States that have good models, and I think that is a real area that you could focus on that really could be one of those pound-wise kind of appropriation angles that we might be able to engage with you on.

VETERANS' COURTS

And then the only other thing I wanted to highlight was a bill that I have cosponsored with Patrick Meehan and Mr. Fattah and a couple of others regarding veterans' courts. It is called the SALUTE Act, and I might just highlight that. That might be one way in which we might be able to reduce some prison costs and help some of our returning veterans with drug courts that might actually benefit them and benefit the bottom line on our expenditures.

Attorney General HOLDER. The two approaches you have talked about are actually ones that are very worthy of exploration. I saw a Pew study on what was done in Kansas, and the numbers are startling. They are really startling, with the approaches that were taken. I think it is really helpful that they come from—the studies I have seen from Texas and Kansas come from what I think are thought of as red States. You know, people might be dismissive of what happened in New York, but when you see what is happening in Texas and in Kansas, I think that is something—I don't dismiss what happened in New York, but I think it is worthy of exploration.

And I think the use of drug courts for veterans is something, given the nature of the service that these people have given to our country, there is a special obligation that we have to deal with

them, and I think that the substance abuse problems that so many of our returning veterans have and then what that means for them in terms of involvement in the criminal justice system, that is something that we will support and try to work with you on. I think that is a very good idea.

Mr. YODER. I appreciate that. Thank you, Mr. Attorney General. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Fattah.

Mr. FATTAH. Thank you.

DISADVANTAGES TO LEGISLATION RESTRICTING LAW ENFORCEMENT

Mr. Attorney General, you had indicated in your opening testimony that one of the real challenges has been this increase in law enforcement deaths. Other than in the Fast and Furious matter, have there been hearings on the Hill that you have been invited to testify on about the increase in law enforcement shootings in the country?

Attorney General HOLDER. No.

Mr. FATTAH. Now, in terms of the shootings yesterday in Ohio, and the other shootings that take place, there seems to be a lot of interest in whether or not we can trace the origins of guns as it relates to Fast and Furious, but no interest in terms of tracing other guns. In fact, the same critics, the same people who are offering criticism of you in not tracking the guns that went to Mexico seem to be the same people who want you to not trace any of the guns that are used here in the United States. So I am trying to work through these contradictions. And it is amazing to me that we could spend our time on this, which is really a criticism of our own law enforcement agencies.

Now, it would seem to me if we write down for certain that the one thing you can't do in a sting operation is A, B and C, then if I am the bad guy, I know how to test out whether or not you are a law enforcement official or not. So I think we ought to be careful about prescribing to law enforcement from a political angle about what it is they can't do in the pursuit of real bad guys.

Now, the chairman of this committee has been very focused on the Mexican drug cartels and their growing influence in our country. So I don't think we should be hampering the Justice Department's activities. And if activities there didn't work out perfectly in one attempt, it wouldn't be the first time that we had to modify processes in order to get at people.

The Bush administration failed for seven years to get bin Laden, but there were modifications made, things were perfected in a way in which we could get the bad guy.

So I don't think that we should be retreating from our efforts to deal with guns flowing to people's hands in Mexico. What we need to do is modify it, get it right. But this selective interest in certain guns being traced and not others, certain shootings but not others, does seem to suggest that their motives here relative to the Congress' interest should be questioned by the public, because we don't seem to be playing with an even hand in dealing with these issues.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you.

I am going to recognize Mr. Serrano, with respect to Mr. Yoder's comment, and to bring this together, I think he makes a pretty valid point. I actually had a question to that effect, and my sense is, it was not your language, having worked in an administration. My sense is that it was OMB, so I am giving you the out, and it probably is OMB because they tell you what to do.

But the question we had is the budget request proposes to eliminate language that prohibits Federal law enforcement officers from transferring firearms to agents of drug cartels unless the officers continuously—and this provides a monitor—control such firearms. And as Mr. Yoder said, it was a 99–0 vote, and Senator Mikulski, the Chair over there, supported this. And I think we would have a hard time leaving this language out because of all these things. So I think Mr. Yoder is making a valid point.

I think, Mr. Fattah, my sense is, you might agree.

If you have never worked in the Executive Branch, you may not know what this is about. On Friday afternoon, before he goes over to testify, this testimony goes over and all these proposals are done through OMB.

My sense is this is an OMB proposal. But the Committee cannot take this out, regardless of what OMB said. So I think we are really all together.

And with that, I will just go to Mr. Serrano. Thank you.

Mr. SERRANO. Thank you, Mr. Chairman.

Attorney General Holder, thank you for joining us today. I am old enough and I have been in public office long enough to remember Justice Departments that were indifferent when people's rights were being trampled or denied, and I know I am old enough to remember Justice Departments that participated in trampling on people's rights.

So when certain incidents create a situation where some Members on the Hill at different venues say that they have lost or are in the process of losing confidence in the Department, I take those comments very seriously, because I remember many difficult days.

So I am just one person saying that I have lost no confidence in your Department or in your leadership. In fact, the strongest point you mentioned here today is that when you find something that is not right, you stop it. But that also means that when you find people are having their rights violated, you also get involved in trying to stop it. And it is a complicated world; it is a complicated situation.

And I just want to tell you, for what it is worth, that in the Bronx we still have great confidence in your ability to be our Attorney General, and we salute you for that.

LEGAL SERVICES CORPORATION

Let me ask you, on one of my favorite issues, one that is, of course, related to you, although it is not part of your testimony today, but you have publicly said that you support the budget and the work of the Legal Services Corporation. The Legal Services Corporation is not going to get a hearing. I am not commenting on that, so I just wanted you to take this opportunity to tell us why you support the President's request and how you see the Legal

Services Corporation and the need for us to have it or not to have it.

Attorney General HOLDER. Yes. One of the things that we have tried to work on in the Department, one of the initiatives that we have started is the whole question of adequate representation for people who appear in court or who have legal disputes that somehow need to be resolved.

There is a crisis in this Nation when it comes to adequate legal representation, whether you are indigent or whether you are a person of low income. And to the extent that we can, as a Federal Government, help our fellow citizens have adequate representation in all the things that they have to deal with, whether it is criminal matters, civil matters, landlord-tenant disputes, custody disputes, it should not be a function of how much money you have, or your access to good lawyers. There is a certain leveling that we ought to have so that people have access to the greatest judicial system in the world, and that is why I think that the Legal Services Corporation is such a vital, vital thing.

Mr. SERRANO. Right. Let me tell you that at the times I have been privileged to be ranking member on this committee with both Chairman Rogers and Chairman Wolf, they have always been very supportive. I can never pass up the opportunity to remind us it is one of Richard Nixon's great parts of his legacy, the Legal Services Corporation.

LAW ENFORCEMENT ISSUES IN NEW YORK

Let me just briefly, as a side note comment on Mr. Honda's extensive work and comments today on that situation in New York. You are going to get a lot of people asking you to get involved. I am not even commenting on the issue itself. But one of the issues that will come up is the fact that the dollars that were used supposedly were dollars intended to fight drug issues in communities like mine, and they were used for another purpose. So I think you should be aware of the fact that that is going to be asked and asked very loudly as to whether that was proper use of those dollars, which don't come out of your Department but directly out of the White House. So that is an issue I guess that is going to come up.

Let me ask you another question. One of the issues that has been very strong in New York City has been the increasing protests and concern about the New York City Police Department's so-called stop-and-frisk policies. Many of these seem to be based solely on the individual's race or ethnicity and done without any reasonable suspicion of criminal activity. I know that several civil rights and civil liberties organizations have brought lawsuits, but can I ask if the Civil Rights Division is currently investigating these practices or whether they intend to do so? Can I also ask if you could get back to us with statistics about the number of complaints that the Department of Justice has received about this policy from New York City.

[The information follows:]

NYPD STOP AND FRISK POLICIES

The Civil Rights Division's Special Litigation Section has identified three complaints regarding the stop and frisk policies of the NYPD. One comprehensive complaint from the ACLU and two citizen complaints. The Attorney General has authority to bring litigation to address patterns or practices by law enforcement agencies that deprive persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. 42 U.S.C. sec. 14141. This authority has been delegated to the Civil Rights Division of the Department of Justice and the Division often works with the local U.S. Attorney's Office. The Division receives thousands of allegations of misconduct by law enforcement officials each year. Each allegation is reviewed and in a portion of cases a formal investigation or another response is authorized. Investigations typically involve site visits, hundreds of interviews and the review of tens of thousands of pages of documents. In addition to Division attorneys and investigators, the Division engages experts, typically well respected law enforcement executives, to assist in the investigation. We cannot provide a general timeframe for a preliminary inquiry or a formal investigation. Timelines for inquiries and investigations are controlled by the facts found.

I must tell you that while I believe 85 percent of the folks that are stopped are African American and Latino, 88 percent of those are found to have had no reason to be stopped. I can tell you that, personally, it is, as you may well know, not only unfair practice, but it is also something that troubles you a lot when you are singled out for questioning on the street when you know you have done nothing wrong. And I know that the police department and law enforcement has to fight crime and look for individuals, but I think you said it best when you said that there should be a reason why something is going on. We think there should be a reason why people are being stopped. And this issue is growing bigger and bigger every day in New York City, and I wanted your comments on it.

Attorney General HOLDER. Yes. There have been an increasing number of concerns raised in that regard. I was speaking actually to Congresswoman Yvette Clarke yesterday at a function, and she raised this very issue with me. I have asked somebody on my staff to look into what is it that we have going in the Department generally and the Civil Rights Division specifically.

I know Ray Kelly. He is a friend. I was born and raised in New York City, born in the Bronx, for that matter, and I think that we have to—as I said before, we have looked at a variety, I think 18 is the number now, of police departments that have engaged in practices that are inconsistent with the way in which they are supposed to serve the people that they represent.

If we find that this is a problem in New York, it is something that we will investigate. It is something at this point that I don't think that we have an open investigation, but it is something that we are cognizant of. So one of the things that we are going to be looking at is to see the nature of the complaints that we are getting. Can we make some preliminary determination if there is a basis for that? And then, on that basis, we would take the appropriate action.

Mr. SERRANO. Thank you.

Mr. Chairman, do I have time for another quick question?

Mr. WOLF. Yes.

VICTIMS COMPENSATION FUND

Mr. SERRANO. Very quickly. You know the Victims Compensation Fund, the 9/11 fund, was reopened, legislation was passed, and there was a big debate in Congress, and at the end of the day, I know we did the right thing. Just very briefly, do you have a status update regarding the reopened 9/11 Victims Compensation Fund, and what problems have arisen that have not been foreseen?

Attorney General HOLDER. Yes. I mean, as we promised, we got it open. I appointed Sheila Birnbaum as the head of that. It was up as soon as funding became available. As I understand it, I think things are going pretty well. There are questions about at least a couple of things: will cancers be covered? What the special master has said is that she will follow what HHS makes the determination. If in fact, there is a basis for that, that would be included.

I have also heard concerns about post-traumatic stress disorder and how that might be affected, how that might be handled. The legislation indicates that treatment can be received for people that have PTSD, but not necessarily compensation. So that is something that I think has caused a bit of friction.

But as I understand it on the reports that I have heard, I think the process has started on time with a good piece of legislation, and I think Ms. Birnbaum is doing a pretty good job. As I said, there are at least those two concerns that I have heard.

Mr. SERRANO. Thank you.

Thank you, sir.

Mr. WOLF. Mr. Austria.

Mr. AUSTRIA. Thank you, Attorney General Holder, for the time you spent with this committee and your service to our country and the good work that the Department of Justice is doing.

PROTECTING OUR CHILDREN

I want to pursue down another route. I appreciate your response to the Crime Victims Fund, but going down the Victims of the Child Abuse Act. First of all, let me thank you and the Department of Justice for your continued efforts to protect our children. I know that is very important.

However, I am very concerned that the same budget that makes it a priority to protect children from abuse and exploitation also removes funding for the Victims of Child Abuse Act. This funding, as you know, allows local child advocacy centers to provide medical treatment and counseling for victims of child abuse and also provides training to prevent future abuse.

In my home State of Ohio, last year alone, child advocacy centers served over 7,000 children, the majority of which were victims of sexual abuse and under the age of 12. Another program which will be defunded is the Court-Appointed Special Advocates Program, CASA, which provides a voice for children in the foster care and child welfare systems.

I know you have talked about a little bit about the budget. I think Mr. Schiff asked a question earlier, and I understand that the budget is being explained that it justifies this elimination by stating these activities can still be funded through other programs. However, without that traditional line item request, there is no

guarantee that these essential services will actually continue to be funded, thus, in my opinion, putting thousands of children at risk for not receiving those essential services.

What are you doing, I guess my question would be, what is the Department of Justice doing to ensure that those services are provided and those children are receiving those essential services, and why did the budget eliminate this funding in direct contradiction of the stated priority goal?

Attorney General HOLDER. We had tough decisions that we had to make with regard to the budget, given the fiscal situation that we faced. The welfare of children is something that I have personally made a part of my tenure as Attorney General. We have the Defending Childhood Initiative. We have a variety of things, Children Exposed to Violence Initiative, a variety of things we do.

In terms of funding, with regard to CASA, we note that States can use their Title II, Part B, formula grant funds to support the activities about which you have raised concern, so there is a replacement mechanism for the funding of the initiatives that you have described.

But I will say that given the financial realities we have to confront, the decision that we made is in no way a retreat from our concern about the children of this Nation who have been victimized. We will do all that we can using the fund that I have talked about and the other mechanisms that we have in place to make sure that we remain engaged in protecting the most vulnerable in this society.

DEFENSE OF MARRIAGE ACT

Mr. AUSTRIA. I appreciate that answer, and because of limited time, I am going to jump over to another area, because I have three different areas I want to touch on. One is, you know, my colleague Mr. Graves here brought up the DOMA question, and I know last year I asked you about this, your decision not to enforce this or not to pursue this because you just, as you mentioned today, thought it was unconstitutional.

My question is, you know, since you have stated that Congress would be allowed the opportunity to defend this law and seemed to be pushing this back toward Congress and we are going through a difficult budget, as Mr. Yoder mentioned, and I think we all agree we are looking at ways to be more cost efficient, I guess my question would be, why should we provide the appropriations for the purposes when Congress would be forced to spend additional funding to do what in my opinion the Department of Justice, it is their responsibility to do, again with DOMA, the Defense of Marriage Act?

Attorney General HOLDER. I am sorry, I am not sure I understand the question.

Mr. AUSTRIA. The funding that is directly related to that and enforcing that and defending that. My question is from an appropriations standpoint, should we continue to fund that area, or should that come back toward Congress?

Attorney General HOLDER. Well, the people who would be responsible for the defense of the Act, the people who are in the Solicitor General's Office, are extremely busy. I can tell you that be-

cause one or two or three, whatever the number might be, are not defending DOMA, they are not sitting up in their offices drinking Cokes and taking it easy and watching television. They are engaged in the work in other cases. In fact, they are overworked. So I am not sure that there are any—

Mr. AUSTRIA. Well, my question is since the recent announcement stating that the Department of Justice would not defend that law in a Federal lawsuit—and let me extend that to now military and veteran benefits from an appropriations standpoint.

Attorney General HOLDER. Yes. I mean, this is something that the Department rarely does, but it has happened on occasion. There are a number of instances in which the Department has decided not to defend a congressionally passed statute. When Chief Justice Roberts was a Deputy Solicitor General, maybe even an Acting Solicitor General at the time, he made the determination not to defend a Federal statute.

DEPARTMENT OF JUSTICE PROCEDURES

You know, it happens periodically, but when it happens, I don't think Congress has ever taken the step of somehow making that have a negative impact on the Department's budget, and I think rightly so.

Mr. AUSTRIA. Let me ask you, Mr. Attorney General, I guess what I am trying to understand, we have a case in Ohio, unrelated to this, dealing with the Corps of Engineers where the Department of Justice is now, on behalf of the U.S. Army Corps of Engineers, is currently suing the state of Ohio and also a private company called Buckingham Coal over certain activities, mining activities. And this is on top of the fact that a Federal judge has already denied a request for a temporary restraining order. Specifically, the judge wrote that the strongest legal argument made by the United States does not have a strong likelihood of success on the merits, that the evidence clearly establishes that the United States is unlikely to suffer permanent injury, and that is also in fact that even the Mine and Safety and Health Administration and the Ohio Department of Natural Resources found the project to be safe and provided all required permits.

Taking a step back, that is just one case, and then looking at DOMA where you decided this wasn't constitutional so you weren't going to pursue it, and then to follow up on Mr. Graves' question on the First Amendment argument over religious freedom with the HHS ruling, can you describe to me the Department of Justice's procedure for determining whether to proceed with a case; whether it be like in Ohio where the court has ruled against the U.S., or whether it be statutory with DOMA, or whether it be a rule with HHS. Specifically, who would have the discretion to make that decision and what cost-benefit considerations are taken into account when that is made?

Attorney General HOLDER. Okay. With regard to the case that you are describing in Ohio, I am not familiar with the facts of that case. But I can say the denial of a TRO has a very high standard that has to be met in order to be granted a temporary restraining order. It doesn't necessarily mean that you will not prevail at a trial. So what we might have sought there might have been denied

by a District Court judge, but that does not necessarily mean if this matter were to go to trial, we would not win at trial. Again, I am not familiar with that case, but I can make that general comment.

With regard to how these decisions are made, there are various levels of responsibility within the Department. We have people who are the heads of the various components who have generally the responsibility of what should happen in a particular component. A Solicitor General has the responsibility for determining when we will appeal or not appeal particular cases.

There are certain matters, however, that become so important that they are surfaced to my level. Our Environment and Natural Resources Division may be handling that case, I am not sure. We have an Assistant Attorney General who would probably make a determination of what is going on there.

Again, very few of the cases that happen, with 116,000 or 115,000 people in the Department, rise to the level of Attorney General consideration. A lot of that responsibility is delegated to the various heads of the components. But there are a variety of supervisory checks that go along from trial attorneys to section chiefs to deputy assistant attorneys general to assistant attorneys general, all of whom generally will sign off before the United States brings suit. That is the way that—

Mr. AUSTRIA. Are you the one that ultimately makes the decision based on the recommendation of those findings?

Attorney General HOLDER. No. As I was trying to say, very few of those determinations rise to my level. They are usually handled in the field by a U.S. Attorney, and if at main Justice, probably by an Assistant Attorney General, although sometimes even below an Assistant Attorney General. It is only those rare cases. The DOMA determination was one that rose to my level, where the Solicitor General thought, and I agreed, that it was ultimately a decision for me to make, with his advice and involving other components within the Department. But those are rare.

Mr. SCHIFF. Will the gentleman yield on this question?

Mr. AUSTRIA. If the Attorney General is finished with his comment. I will let him finish his comment first.

Attorney General HOLDER. No, I was done.

Mr. AUSTRIA. Yes, I will yield.

Mr. SCHIFF. I thank the gentleman for yielding.

And, you know, I agree with the Attorney General's assessment that DOMA is unconstitutional, and I wouldn't want you or the Department defending something that you believe is unconstitutional.

This has been done by prior Attorneys General, and in fact, the House majority filed an amicus brief in support of DOMA, which I didn't agree with the House using its resources that way.

I would just ask my colleague whether he feels that the Department should defend laws even if they feel that is unconstitutional, the law is unconstitutional, because that would be a departure from a Justice Department policy under both Republican and Democratic administrations.

Mr. AUSTRIA. Reclaiming my time, and I appreciate that question, I would just say that my question is, number one, trying to understand how the Attorney General's Office and the Department of Justice decides what cases they are going to pursue, what they

are not; whether it be statute, whether it be rule. The second thing is, from an appropriations standpoint, are we funding something that the Department of Justice has decided that they are not going to pursue, whether it be a Federal lawsuit concerning our military and veteran benefits directly related to DOMA?

ILLEGAL IMMIGRATION

So, reclaiming my time, just real quick, one other area I wanted to touch on, I know my time has expired, if I can, Mr. Chairman, on another issue, and that is immigration. Because one other concern I had looking through the budget, and I applaud your goal to continue to protect our national security and I know we have gotten into this a little bit, but dealing with illegal immigration and Americans that are here illegally, the budget is proposing to cut 1,200 deportation beds to find alternatives to detention programs. I have concerns about that.

What concerns me is this will result in more illegal immigrants evading the removal process, a fact which even the Department of Justice has confirmed does happen. The Department of Justice records show that from 1996, 40 percent of all non-detained illegal immigrants have become fugitives from the removal proceedings.

Can you help me better understand and explain how you are going to continue to ensure that the integrity of these CART proceedings through the Department of Justice continue?

Attorney General HOLDER. Well, let me just say one thing. In terms of the Department deciding not to defend statutes it believed unconstitutional, I have just here in front of me a 3-page document that has 14 instances of that happening in the past, not involving this Department of Justice or while I was Attorney General. I can certainly make that available for you to look at.

With regard to the question of immigration, the Department is not shrinking from its responsibility. We are working with our partners at DHS to come up with a mechanism, ways in which we stop the flow of illegal immigration. I personally think that we need a comprehensive approach to this that means securing our borders and dealing with people who are here.

We have come up with Operation Streamline. It is a mechanism that has proven to be effective, and we are now using that nationwide and using it under standards so that people, where we use that program, are treated the same. We have moved—primarily it is DHS's responsibility, but we have moved people to the border to support our colleagues at DHS.

Whatever our specific budgetary requests are, again, they are not a retreat from our determination to make sure that our borders are secure and that the illegal immigration problem is dealt with. And I think, as I said, that our colleagues at DHS have done a good job. Can we do better? Yes, and we are trying to do better in innovative and efficient ways.

Mr. AUSTRIA. Thank you, Mr. Chairman.

Thank you, Attorney General, for your time.

Mr. WOLF. Mr. Culberson.

Mr. CULBERSON. Thank you, Mr. Chairman.

Thank you, Mr. Attorney General, for being with us today.

VOTER FRAUD

In 1993, the Congress enacted the National Voter Registration Act and established procedures to increase the number of registered voters and to protect the integrity of the electoral process, both valid legitimate State interests. Under the Bush administration, the Congress enacted the Help America Vote Act, which required every State to create and maintain a computerized statewide list of registered voters. I am sure you would agree that there is a valid State interest in ensuring that voter registration rolls are modernized and computerized and accurate?

Attorney General HOLDER. Yes. Absolutely. That is the biggest problem that we have in terms of voter involvement; the registration process that we have is inadequate.

Mr. CULBERSON. Sure. And you would also agree that it is a legitimate State interest to safeguard voter confidence in the accuracy of the elections and that only people that are qualified to vote vote?

Attorney General HOLDER. Sure. To make sure that confidence is something that I think cuts in two ways, to make sure that we have people who are legitimately voting, but also to make sure that people have confidence that the system is designed to maximize turnout and that all people have an opportunity to vote.

Mr. CULBERSON. Sure. It is another legitimate interest in ensuring that only the votes of eligible voters are counted. That is a legitimate State interest?

Attorney General HOLDER. Sure. And one of the things that I have in my career tried to do. As I said before, I have tried voter fraud cases.

Mr. CULBERSON. Obviously, it is another legitimate State interest in deterring and identifying and even prosecuting voter fraud.

Attorney General HOLDER. Sure. Very legitimate.

Mr. CULBERSON. The Help America Vote Act that Congress enacted, I know you are familiar with it, not only requires States to verify voter information but also imposes new identification requirements on individuals seeking to vote for the first time. The Federal law enacted by Congress requires that a voter applicant present local election officials with written identification which may be a current valid photo identification, and that Federal law requirement, of course, is consistent with the law enacted in a number of different jurisdictions around the country. And under the Help America Vote Act, if a voter is voting by mail, they must also include a copy of their photo ID with the ballot.

TEXAS VOTER ID LAW

In 2008 the State of Indiana had enacted a voter ID law, and the District Court actually granted summary judgment because the District Court and the Court of Appeals and the Supreme Court agreed with you that everything we just went through are indeed legitimate State interests and that any burden placed on individual voters to produce an ID was not sufficient to overcome those very legitimate State interests, and the Supreme Court upheld in a very strongly worded opinion the Indiana voter ID law, and the State of Texas, along with several other jurisdictions, Georgia, I know

Kansas, Wisconsin, South Carolina, Tennessee, have voter ID laws, and it is not just in Texas, but in the case of Texas, the one I am obviously the most familiar with, our State Attorney General has been compelled to go to a three judge panel because the Department of Justice will not pre-clear or approve the State's voter ID law and the Department of Justice has asked for, Mr. Attorney General, in a request for additional information from the Attorney General, from the Attorney General of Texas, the Department of Justice has asked for a racial breakdown of the 605,000 or so voters who allegedly don't have State-issued photo IDs.

The Secretary, I want to make sure you are aware of the fact that I think since the 1960s the State of Texas has not required people to submit their race on their voter application. There is no box anywhere on the voter registration application for race.

Your Department has asked for information that doesn't exist in the Secretary of State's records or any County Clerk's records. I want to know if you were aware that your Department is holding up approval of Texas' voter ID law by asking for information which does not exist?

Attorney General HOLDER. Well, we have the voter ID law under review. I believe we are going to respond, express our position on that law on March the 12th. Our determination with regard to the submission is due on March the 12th. So we have not made any determinations yet with regard to the photo ID requirement that has been imposed by Texas.

Mr. CULBERSON. This has been going on, though, since the adjournment of the last session of legislature at the end of the spring of last year, and the Texas primary has been delayed, by the ongoing litigation under section 5 of the Voting Rights Act and our primary has been pushed back to at least April. So the delay of the Department of Justice has a profound impact on the ability of Texas to conduct an election in a way that ensures only eligible voters are voting.

So I would like to ask you, sir, if you would expedite, please, the review of this. Obviously, you are asking for information that doesn't exist. It seems to me an unreasonable request, one that we can't even comply with. Would you expedite your review of the Texas voter ID law?

Attorney General HOLDER. Well, as I said, our response is due on March the 12th. There is a three judge panel that has under advisement the other matters that have been considered with regard to Texas' voting issues. The trial has occurred, and we are just waiting to hear from the court. I can't expedite the court. And I can say that we are looking at, what, I guess 14, 15 days, I am not sure what the date is. But March the 12th, we will have our views expressed on the photo ID.

Mr. FATTAH. Will the gentleman from Texas take a quick question from me?

Mr. CULBERSON. Yes, sir. Certainly.

Mr. FATTAH. Is it accurate, and I don't know the facts, but it is in print that in the Texas ID law, that if I was a student at the University of Texas and I had a photo ID from the college, that that would not allow me to vote?

Mr. CULBERSON. No, I don't think it is prohibited. I have got the law in front of me, and it has all kinds of exceptions in it. If you are disabled, you don't have to produce a photo ID.

Mr. FATTAH. No, I just want to know whether if you are at a State university, whether that card works under that law?

Mr. CULBERSON. I don't know why it wouldn't. I don't see any prohibition against it.

Mr. FATTAH. My understanding is that it is specifically prohibited, but for instance, having an NRA membership card would allow me to vote.

Mr. CULBERSON. I don't think that is accurate. I don't see any prohibition against a photo ID issued by a State University of Texas. I have the bill right here.

Mr. FATTAH. I think that the concern that some of us have is that you seem to have an organization of a number of States that all of a sudden have decided to put in place legitimate or nonlegitimate roadblocks, depending on your perspective, of people exercising not their privilege to vote but their right to vote. Now, I think it will be overcome under whatever circumstances the court decides. If they need a voter ID, I am sure they will get one, because people have lost their lives to get the right to vote, so they will get a voter ID if they need to.

The real question is whether there is some organized effort to have Americans be denied the right to vote. I think that is the concern we are trying to get at.

Mr. CULBERSON. Of course, nobody is doing that.

Mr. FATTAH. I am not ascribing that to you at all, but I am just trying to tell you why people are concerned about that issue.

Mr. CULBERSON. The only people who seem to be concerned is predominantly coming from members of your party, and there is no one who has any concern at all about preventing or prohibiting people from voting. It truly has been in terms of organized resistance coming overwhelmingly from the Democratic Party.

Mr. FATTAH. And you know the States that are doing this seem to be all headed by members of your party.

Mr. CULBERSON. As the Attorney General has said, it is a legitimate valid State interest in preserving the integrity of elections, that only eligible voters can vote. I see nothing in the law that prohibits a valid student ID issued by a State university from being used to vote. There is certainly nothing in the law that talks about the NRA. I don't think that is a part of this discussion.

My question though is, Mr. Attorney General, would you please drop the requirement that Texas produce racial breakdown on their voter applications since that information does not exist and is not a part of our voter application?

Attorney General HOLDER. Well, you talked about one source of that information. There are the other ways, I am sure, that if in fact that is a request that has been made of Texas, there are other ways in which those kinds of determinations, I am sure, can be made. I am not—

Mr. CULBERSON. It is not a part of our records. It is nowhere in the record because of, obviously, the problems that existed way before our lifetimes that discriminated against people. It just has been dropped. We can't find the information because it is irrele-

vant. This is a color-blind society. There is no record of what a person's race is, to my knowledge, in the voter registration rolls. It is not even a part of the voter application.

It really is distressing. Since the information doesn't exist and the Department has asked for it, it can't look anything but like an effort to delay approval of Texas' voter ID law, which will hamper our ability to conduct our elections on time. That is the concern.

Attorney General HOLDER. Well, if Texas doesn't have the capacity to do that, that is something that certainly ought to be shared and would be part of the determination we would make. But I would also think there are other ways of gleaning that information. That is one source of information, but there are other ways that people much more sophisticated than me can come up with making determinations as to what a particular population looks like, what is a representative sample, and you extrapolate from there. Again, I am not an expert.

Mr. CULBERSON. Sure. If I could show you that information doesn't exist in the County Clerk or the Secretary of State or the voter registration rolls, would you drop that requirement?

Attorney General HOLDER. No, because it would seem to me, as I said, that there are the other ways in which you can get that information, I am sure.

Mr. CULBERSON. A couple other quick points, Mr. Chairman. I thank you so much for being so indulgent to all of us and giving the time.

The chairman has always been very gracious, and obviously, we yield to each other and give each other plenty of time to ask questions.

I won't be that much longer, but it is important to note I am not aware of and looking at the *Crawford v. Marion County* case in Indiana and subsequent cases, the Supreme Court has, to my knowledge, fairly routinely upheld the validity of voter ID laws, whereas in the case of Texas, if you have a disability, you have got the ability to file a provisional ballot. Texas meets all those constitutional requirements. Is there some Supreme Court case I am unaware of, Mr. Attorney General, that has overturned a voter ID law like Texas'?

Attorney General HOLDER. Not that I am aware of, but I think *Crawford*, if I am not mistaken, did not involve a Section 5 challenge to a photo ID law. But more importantly, it seems to me, we have a solution here that is in search of a problem. There is no indication, no indication, that we have widespread in-person voter fraud, which photo IDs are designed to prevent.

And you say it is the Democratic Party that is doing these things; I think that Congressman Fattah makes a good point. Let us look at the reality of this, at the places where these photo ID laws have been enacted where you have had Republican Governors, Republican legislatures pass them. There may be legitimate bases for that, but I don't think it is fair to ascribe a concern in this regard to only the Democratic Party when one looks at the way in which these things have been passed.

Mr. CULBERSON. So your objection is political?

Attorney General HOLDER. No, I am not saying that.

Mr. CULBERSON. Well, there is no legal basis on which to ground your objection.

Attorney General HOLDER. Oh, I think there is a legal basis for it, a basis for the consideration that we have with regard to Texas and a legal basis for the opposition that we have lodged in other places, South Carolina among them, where we cited the Voting Rights Act as being contravened by what South Carolina sought. And I am not saying what we are going to do with regard to Texas, but to the extent there was the possibility of opposition, it would be grounded in the law and not in politics.

DEFENDING THE CONSTITUTIONALITY OF STATUTES

Mr. CULBERSON. A couple other quick questions. Could you please provide us with a list of, you say you have an example of 14 statutes where the Department has refused to defend the constitutionality of those statutes. That would be interesting because it seems to me the job of the Attorney General is to defend the laws enacted by Congress, and if there is a problem if you believe with their constitutionality, then the Department obviously should come to the Congress and ask us to amend them. I would like to see the list.

Attorney General HOLDER. Sure. I have the list here. It goes as far back as 1946. And, as I said, you have Chief Justice Roberts in one of them.

[The information follows:]

EXAMPLES OF NON-DEFENSE OF STATUTES

Following is the referenced list of examples of past instances in which the Department has declined to defend the constitutionality of statutes:

ACLU v. Mineta (2004). The Department declined to defend against First Amendment challenge a statute conditioning federal funding on agreement by mass transit agencies not to display advertising promoting the legalization of marijuana. The Department originally defended the statute in district court as a valid exercise of Congress' spending power, and relied in part on the ability of mass transit agencies to comply with the requirement in a viewpoint-neutral manner by barring a broader swath of advertising than that specified by Congress. The Department later determined that the statute should not be defended and declined to defend it on appeal.

Dickerson v. United States (2000). In the aftermath of the *Miranda* decision, Congress enacted 18 U.S.C. 3501, allowing for the admission of confessions taken without *Miranda* warnings. Subsequent Supreme Court decisions called into question *Miranda*'s constitutional statute, and those cases were relied on by proponents of section 3501 to defend its constitutionality. But the Department declined to defend section 3501 and instead argued in the Supreme Court that the congressional statute was unconstitutional. The Supreme Court appointed amicus to defend the statute; members of Congress also filed amicus briefs in defense.

HIV-Exclusion (1996). When Congress included in an authorization act a requirement that the military discharge HIV-positive military personnel, President Clinton announced his judgment that the provision was unconstitutional, and instructed the Attorney General not to defend the law in court. The President also directed the Secretary of Defense to enforce the statute pending a final judicial determination of unconstitutionality or repeal. Congress repealed the provision before any litigation commenced.

Children's Health Care Is a Legal Duty v. Vladeck (1996). The Department declined to defend against Establishment Clause challenges a federal statutory provision granting benefits to certain Christian Science health facilities under the Medicare and Medicaid Acts. Though the Department defended the provision in the district court, it later determined that the statute should not be defended and declined to pursue an appeal.

Turner Broadcasting Sys., Inc. v. FCC (1996). In this case, the Supreme Court upheld the constitutionality of certain "must carry" provisions of the Cable Television Act. That Act was enacted over President Bush's veto, which stated that the must-carry provision was unconstitutional. In the initial litigation challenging the must-carry provisions, the Department of Justice, appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, "consistent with President Bush's veto message." The Department urged the court to permit adequate time to provide Congress the opportunity to defend the validity of the statute. While preliminary proceedings were ongoing, the Clinton Administration reconsidered

President Bush's previous position and the Department defended the must-carry provision, ultimately succeeding in the Supreme Court.

Wauchope v. Department of State (1993). In both the district and appellate courts, the Department defended a statute favoring citizen fathers over citizen mothers by giving fathers alone the power to pass citizenship to children born outside the United States. The Department declined to seek certiorari when the Court of Appeals ruled against it, on the grounds that the ruling was "consistent with modern developments in the Supreme Court's jurisprudence" regarding gender distinctions.

Metro Broadcasting v. FCC (1990). The Acting Solicitor General (John Roberts) effectively argued for the unconstitutionality of a federal statute providing for minority preferences in licensing. The United States took the view that strict scrutiny applied to the FCC minority preference program, despite Supreme Court precedent applying a more permissive standard to federal affirmative action programs. The Acting SG authorized the FCC to appear before the Court through its own attorneys to defend the statute. The Court upheld the minority preference program.

Morrison v. Olson, 487 U.S. 654 (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. *Id.* at 666-67. Despite the fact that the Department thus had "implemented the act faithfully while it has been in effect," the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as *amicus curiae* to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

INS v. Chadha, 462 U.S. 919 (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a "one-house veto" of the House of Representatives that ordered the INS to overturn its suspension of Chadha's deportation. *Id.* at 928. Nonetheless, when Chadha petitioned for review of the INS's deportation order, the INS – represented by the Solicitor General in the Supreme Court – joined Chadha in arguing that the one-house veto provision was unconstitutional. *Id.* at 928, 939. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. *Id.* at 930 & n.5, 939-40. The Supreme Court invalidated the statutory one-house "veto" as a violation of the separation of powers.

League of Women Voters of California v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Public Broadcasting Act of 1967 prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge. The defendant FCC, through the Department of Justice, represented to the court that it would continue to enforce the prohibition, if only for the purposes of "test litigation," but that it would not defend the statute's constitutionality. Senate Legal Counsel appeared in the case on behalf of the Senate as *amicus curiae*, and successfully urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any

enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department's previous position and decided that the Department could defend the statute. The Supreme Court ultimately held that the statute violated the First Amendment. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at cost because he was not an NRA member. *Id.* at 1040. Nonetheless, the Department of Justice concluded – and informed the court – that the NRA membership requirement violated the equal protection component of the Fifth Amendment's Due Process Clause because the discrimination against non-NRA members "does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." *Id.* at 1044. The Department reached this conclusion on the basis of advice from the Army that the membership requirement "serves no valid purpose" that was not otherwise met. *Id.* The district court afforded Congress an opportunity to "file its own defense of the statute should it choose to do so," *id.*, but Congress declined to act on this invitation. *Id.* The court permitted the NRA itself to intervene and argue on behalf of the statute's constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment. *Id.* at 1044-49.

Simkins v. Moses H. Cone Memorial Hospital (1963). The Department not only declined to defend a federal statute and regulation providing for funding of so-called "separate but equal" hospital facilities but, as the court put it, "unusually enough, [] joined the plaintiffs in this attack on the congressional Act and the regulation" by intervening in a private class action. 323 F. 2d 959. The disputed issue in *Moses H. Cone* was whether a hospital's receipt of federal funds was sufficient under the state action doctrine to trigger the Fifth Amendment, and, if so, whether federal funding of segregated facilities (versus direct maintenance of such facilities) violated the equal protection component of that Amendment. The Department took the position that the requisite state action was present and that the federal provisions violated the Equal Protection Clause, arguing specifically that the federal government had "affirmatively sanctioned" the discrimination at issue.

United States v. Lovett, 328 U.S. 303 (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the United States as defendant, nonetheless joined those officials in arguing that the statute was an unconstitutional bill of attainder. *Id.* at 306. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, *id.*, and the Court of Claims and the Supreme Court gave Congress's counsel leave to appear as *amicus curiae* on behalf of the enactment. The Supreme Court held that the statute was an unconstitutional bill of attainder.

SCHOOL-ISSUED PHOTO IDS

Mr. FATTAH. If the gentleman would yield for one second for insertion into the record, and I will provide this in print. But you cannot use a school issued ID, photo ID, in Texas elections. This is not acceptable under the statute. You can use, for instance under the statute that is being reviewed by the Justice Department, a concealed weapons permit.

[The information follows:]

San Antonio Express-News

Voter ID law put on hold by feds

By Gary Scharrer

Updated 11:27 p.m., Thursday, November 17, 2011

AUSTIN — The Texas voter ID law, one of Gov. Rick Perry's top priorities during the 2011 Legislature, has been stalled by the U.S. Justice Department, which is insisting on demographic information about voters that state election officials say is virtually impossible to provide.

Texas Republicans expressed dismay Thursday after Justice Department officials said they need voter information about race and ethnicity before they can approve the controversial law, which is scheduled to take effect Jan. 1.

The ruling raises the possibility that the law will not be in place by the March 6 primary.

Information that Texas election officials have provided so far “is incomplete and does not enable us to determine that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language group (required under the Voting Rights Act),” T. Christian Herren Jr., chief of the Justice Department's Voting Section, said in a letter to Texas elections director Ann McGeehan.

The requested information will be virtually impossible to gather, said state Rep. Patricia Harless, R-Spring, House sponsor of the voter ID bill, SB 14.

“I am disappointed,” she said. “I don't know that the secretary of state can provide the information in the format that they want. I am not sure that we will be able to satisfy them. I think it's ridiculous.”

State election officials don't track voters by race or ethnicity, said Rich Parsons, spokesman for Texas Secretary of State Hope Andrade.

“So there's no accurate way to provide a racial breakdown of voters,” he said.

Election officials, he said, would do “our best to provide them the data they request but it will be unreliable.”

Texas can match voter registration lists with Department of Public Safety records to collect racial data for some voters, Parsons said, but DPS did not provide a specific category for “Hispanic” Texans until 2009.

Sen. Rodney Ellis, D-Houston, has been pressing state officials to come up with the demographic information on voters in an effort to determine if the new law could have a bigger impact on minorities.

“I am pleased that (Justice Department) is asking the probative questions, which indicates they suspect the real issue is voter suppression,” Ellis said.

Republicans pushed the voter ID measure to ensure all voters are properly identified and eligible to vote. Democrats countered that there is no evidence of voter impersonation in Texas and that the bill simply was an effort to make voting more difficult for low-income Texas, students and the elderly, who typically vote for Democrats.

The new law would require voters to show a Texas driver's license, a Texas concealed handgun license, a U.S. passport, citizenship papers, or a military identification card before they could cast a ballot. Student ID cards issued by state universities, out-of-state driver's licenses, or ID cards issued to state employees would not be accepted.

Because of past discrimination, the Voting Rights Act of 1965 requires Texas and other Southern states receive preclearance by the Justice Department for changes to existing voting laws or redrawing of political districts.

The Texas secretary of state sought Justice Department preclearance for the new voter ID law in July, but the Justice Department requested additional information to determine if changes to existing law would discriminate against minorities, particularly Hispanics.

Thursday, the Justice Department said preclearance could be denied because the state “has not provided any of the required data by race.”

The Justice Department wants to know the number of registered voters in each Texas county — by race and Spanish surname — who have a Texas driver's license or other photo identification issued by the Texas Department of Public Safety.

Harless could not speculate on whether the voter ID bill would be in place for next year's elections.

“But it is absolutely possible that it may not be in effect by the next election cycle — for sure by the (March 6) primary,” she said. “The Department of Justice has made it clear that they are not going to make this easy on us.”

The Justice Department has 60 days to consider a completed application, but the review period will not start until the agency receives the requested information, according to Herren's letter.

Harless and others thought the 60-day clock started Oct. 5 when the secretary of state initially responded to the Justice Department inquiry.

“This letter confirms that we were wrong. The clock will not start running until they get the information that they want,” Harless said.

“Texas Republican leaders are getting exactly what they deserve,” said Rep. Trey Martinez Fischer, D-San Antonio, chairman of the Mexican American Legislative Caucus, which fought the bill. “They made it so difficult for Texans who express a desire to vote to actually go out and vote. If you are going to set the bar that high, you better set the burden for preclearance equally as high to make sure that this is not being done for nefarious and discriminatory purposes,” he said.

The Justice Department letter represents “a welcome to reality,” Martinez Fischer said.

“This is exactly the position that the critics like MALC have been saying from Day 1. This law, by its nature and design, is discriminatory,” he said. “Because it is, the state of Texas has a tremendous burden to fulfill in presenting all of its documentation and evidence to suggest that it is not.”

Staff Writer Gary Martin contributed to this report.

Mr. CULBERSON. Oh, yes, absolutely. That is carefully vetted.

Mr. FATTAH. I just want to be clear. As you know, we have some people who think the kids at college are snobs or at least kids are snobs, and then that the people who have concealed weapons are patriots. We don't want Americans' rights to vote to be subjected to these kind of partisan views. That is why these issues have to be reviewed. Because a student-issued ID from a State university in Texas should be, in my opinion, just as valid a process under which someone should be able to exercise their right to vote as any other form of State-issued ID. Thank you.

Mr. CULBERSON. Well, it is not, as I think you said a minute ago, an NRA ID. That is a State-issued—

Mr. FATTAH. I misspoke. But I think you don't want to get on the side road. Just focus on what I said. That a State issued ID from a State university should be allowed if what one is seeking is a photo ID, right?

Mr. CULBERSON. It is up to the State legislators to decide whether or not the verification procedures for issuing that ID are sufficient. I am confident they had good reason. I don't see it prohibited in the statute. We will have to find it.

Mr. FATTAH. I served in the State legislature and I agree with you, it is up to them. But in our county, in order to vote in a Federal election, it is up to the United States Justice Department to make sure that your rights are not abridged. So Texas can do what it wants. The Justice Department needs to look at this and make sure that kids, young people at these schools and other people, who may be discriminated against in this process, are not being done so illegally.

OPERATION FAST AND FURIOUS

Mr. CULBERSON. Finally, Mr. Attorney General, in response to Mr. Yoder's questions, you said when you learned about Fast and Furious, you told the Department to stop it. When precisely did you learn about it, and in what form did you tell them to stop it, and have you provided all that information to the Congress?

Attorney General HOLDER. I have testified about this on a number of occasions. I learned about—I issued the directive in February or March of 2011. A directive went out to the field from the Deputy Attorney General to stop these practices. I am sorry, what was the other part of the question?

Mr. CULBERSON. What form? You sent it out in writing, or by a directive?

Attorney General HOLDER. Yes, something went out in writing from the Deputy Attorney General to all the members of the Justice Department.

Mr. CULBERSON. Chairman Issa's website says that you have only produced 8 percent of the documents identified as being relevant to the program in a response to their subpoena. If it is not 8 percent, what percentage do you think of the documents that are relevant have you provided to the Congress?

Attorney General HOLDER. So far, we have turned over about 6,800 documents. You have to understand that the nature of what has been asked of us, I think there are over 200 custodians that are supposed to be looking. The universe of documents we are look-

ing at totals about 37 million, and we are in the process of having people go through these things. We are on a production schedule where every other Thursday or Friday we are turning materials over to that committee, and also to the committee where Senator Grassley serves. We are trying to comply with those requests as quickly as we can.

But I would say of the documents we have already turned over, that material really deals with all of the people who are the most intimately involved in Fast and Furious. So I think that we have done a good job. But the responsibility we have is an ongoing one, and we have ongoing efforts.

Mr. CULBERSON. Sure. Eight percent? Fifty percent?

Attorney General HOLDER. We have 6,800 documents. It is hard to say. As I say, we started off with number 37, those get de-duped. I think you get down to about 10 million or so. So we are going through those things as quickly as we can.

Mr. CULBERSON. Thank you for the time, Mr. Attorney General.

Mr. WOLF. Mr. Attorney General, there are a lot of questions I have now. Do you want to take a break for a minute or two or are you okay to continue?

Attorney General HOLDER. I am fine.

Mr. WOLF. Okay. We will hopefully go to 1, or I think the first vote will be about 1 or 1:30, but I thought I would offer you that.

DOMESTIC RADICALIZATION

With regard to our national security, another top terrorism concern is domestic radicalization. Just in Northern Virginia the cases of domestic radicalization have been quite extensive. The individual taken into custody two weeks ago before he could proceed with an intended bomb attack on the Capitol is one example. The Congress included an increase of \$4 million in the fiscal year 2012 bill for NIJ to conduct domestic radicalization research. Can you update us on what you are doing with the funding, what is our current best understanding about radicalization, how to prevent it and who received a contract to conduct this research?

Attorney General HOLDER. The problem of domestic radicalization is in some ways the most worrisome of the issues that we confront. Individuals who are here in this Nation and who become radicalized in a variety of means, I guess we have come to call them lone wolves, in some way present the greatest danger that this Nation confronts. Organizations are in some ways easier to track to get information on. These individuals are more difficult, and what in some ways is most perplexing is to try to understand why people who are in this Nation, the greatest nation on Earth, and who have all the benefits that inure from that, would become radicalized.

So we have a variety of things that we are doing. We work with our partners at DHS. We work with our partners in the Intelligence Community. I meet every Tuesday with the President and his national security team and we go over these issues. So we are trying to come up with a very robust program.

Mr. WOLF. Can you tell us what you did with the \$4 million that we appropriated?

Attorney General HOLDER. We have a variety of things that we have done. There is a strategic implementation plan. We co-chair the National Engagement Task Force with DHS. We have outreach efforts that we are a part of. There are a whole variety of things that we do involving the FBI, involving components within the Justice Department.

Mr. WOLF. But the reference is the \$4 million went to NIJ to conduct domestic radicalization research. I know you do many other things. I am referring specifically to that.

Attorney General HOLDER. Yes. Well, what I can do is, if you allow me, I can come up with a written response to that and detail what exactly we have done at NIJ with that \$4 million.

[The information follows:]

DOMESTIC RADICALIZATION

The National Institute of Justice received \$4 million in FY 2012 for a new domestic radicalization research initiative. Final plans for the use of these funds are subject to review of the Department's spending plan by congressional appropriators. OJP plans to use these funds to improve understanding of domestic radicalization to violent extremism and to advance evidence-based strategies for effective prevention and intervention. NIJ will obtain these results through awards made through a competitive, peer-reviewed process. NIJ may also fund, if appropriate, interagency reimbursable agreements with other federal agencies, to leverage the investment or infrastructure of these agencies for criminal justice applications.

NIJ has moved quickly to ascertain the state of knowledge in the field of domestic radicalization and to ensure it does not replicate those projects already underway in the United States. NIJ is coordinating its efforts with representatives from the Departments of Homeland Security, Defense, Justice and USAID. NIJ also reviewed the recent strategy documents from the Administration and has consulted the White House on the research plan outlined below.

From these reviews, NIJ sees that our state, local and tribal communities require research and evaluation studies that tell them how to prevent and respond to instances of radicalization. To deliver this information, NIJ is focusing on two major efforts:

- First is a research solicitation that focuses on domestic radicalization. This solicitation, which NIJ expects to release in April, will solicit projects that address how domestic radicalization and the most productive roles criminal justice agencies can play in their communities in order to counter radicalization. Especially important in this regard is how radicalization leads to lone wolf violent extremists.
- Second, NIJ intends to conduct evaluations to identify evidence-based practices that are effective at preventing or addressing radicalization in our communities. Likely candidates for these evaluations are community-level intervention programs that include training programs for state, local and tribal law enforcement agencies.

Finally, NIJ is also examining whether a survey that measures the impact of radicalization in our communities and that captures the measures that our criminal justice agencies are taking to counter radicalization in our communities is in order.

TERRORIST FINANCING

Mr. WOLF. Sure. The sooner the better, before we get into mark-ups, if you could.

As you know, the Justice Department was intimately involved in a 15-year investigation which culminated in the Holy Land Foundation and five of its former organizers being found guilty of illegally funneling more than \$12 million to the terrorist group Hamas. According to the Department of Justice press release, "From its inception, the Holy Land Foundation existed to support Hamas." The government's case included testimony that in the early 1990s, Hamas' parent organization, the Muslim Brotherhood, planned to establish a network of organizations in the U.S. To spread a militant Islamic message and raise money for Hamas.

The defendant sent Holy Land Foundation-raised funds to Hamas-controlled zakat committees and charitable societies in the West Bank and in Gaza. Among the organizations that were in a network described by the Department was the Council on American-Islamic Relations—CAIR.

As you may know, Director Mueller has a strong policy in place prohibiting the FBI from working with CAIR and unindicted co-conspirators in terrorism cases. Do you have a similar policy in your office for the Attorney General and also for U.S. Attorneys?

Attorney General HOLDER. I am not sure if we have a formal policy, but I know that we have been very careful in interacting in any groups that involve CAIR. I know that I have refused to go to meetings where I knew they were going to be present.

I am not sure if we have a policy, as much as we know, certainly all the U.S. Attorneys know about the concerns we have about that organization. And as I said, as for myself, I have refused to go to particular meetings knowing that CAIR was going to be there.

Mr. WOLF. Well, I appreciate that. Can your U.S. Attorneys go to meetings where CAIR will be?

Attorney General HOLDER. As I said, I am not sure that we have a policy, and it might depend on the nature of the meeting, how large it is, what the nature of the meeting is, what they are trying to accomplish at the meeting.

Mr. WOLF. I appreciate the fact you have not gone to meetings with CAIR, and I thank you for that. Could you spell out this policy with regard to U.S. Attorneys and get us just a letter to that effect?

Attorney General HOLDER. We can do that.

[The information follows:]

CAIR POLICIES

The Department of Justice has no formal policy governing the engagement of the United States Attorney's Office with CAIR representatives or members. The U.S. Attorney community, however, is well aware of the FBI's policy regarding its own interaction with CAIR and, as a result, before engaging with CAIR, U.S. Attorney's Offices usually consult with their respective FBI districts.

Mr. WOLF. We do carry language with regard to the FBI. It may not be necessary to carry out language with regard to the U.S. Attorneys, but if it is, we would be open. But I thank you for not meeting with CAIR.

FBI TRAINING DOCUMENT REVIEW

I was concerned to learn from the press release issued by the Islamic Society of North America, ISNA, an unindicted coconspirator in the Holy Land Foundation, that the FBI has removed hundreds of counterterrorism training documents that were found to be politically incorrect. I am concerned about this for two reasons. One, the Congress was never notified of this review. We saw it in a ISNA press statement when I thought the FBI would have come up and briefed the Intelligence Committee or briefed this committee. Second, the decision to remove the materials was announced by ISNA, which the FBI should not be working with because this organization is an unindicted coconspirator. We carry language in our bill which says that they ought not be working with an unindicted coconspirator.

Did anyone on your staff ask or direct the FBI to conduct this review, or did anyone on your staff direct the FBI to include ISNA or outside groups in the review process?

Attorney General HOLDER. No, we didn't direct the FBI or tell them who they had to work with. I know that Director Mueller was very concerned about some of these training materials that were used, and he ordered a review to be done. I am not sure how ISNA got involved in this, but I know that the FBI internally looked at these things at the direction of Director Mueller to remove material that was offensive but, more importantly, just not really productive when it came to the training that was supposed to be occurring. As I understand the process that the Bureau went through, it was an internal process.

Mr. WOLF. Well, what the committee would like to see is what was taken out, and then what I would like to do is have the opportunity to contact Bruce Hoffman, who is a very capable—do you know Bruce Hoffman, teaches at Georgetown? I think he is a Democrat actually, a very prominent person, well respected, well thought of. People that are interested—Mr. Serrano is smiling, but people that are interested in counterterrorism know Bruce. But he is somebody who I have great respect for who teaches at Georgetown. But we are also going to speak to Bernard Lewis and people like that to see. So we would like to see what was taken out to see if it fits into the category of truly appropriate to take out or not to take out.

Attorney General HOLDER. Well, that is something that, as I said, the FBI was handling. I would defer to—

Mr. WOLF. If you would just tell us, we are going to ask the FBI. The FBI is going to come up, and that is a request we are going to make to see what has been taken out so we can have an objective person take it.

Attorney General HOLDER. With all due respect, I think that might be a request more appropriately directed at my good friend, Bob Mueller.

Mr. WOLF. Okay. I am not the president of the Bob Mueller fan club, but I could be an officer in that club, I will put it that way. So if you would just pass the word that that is what we would expect.

Attorney General HOLDER. I will.

GANGS

Mr. WOLF. Gangs. As you know, gangs continue to commit criminal activity across the country and recruit young people into lives of crime. The "National Gang Threat Assessment for 2011" reported an increase in gang membership and an expansion of gang influence over street-level drug sales, including gangs tied to Mexican drug trafficking organizations. Gangs are responsible for an average of 48 percent of violent crime in most jurisdictions and had a major impact in the Northern Virginia area and the Washington, D.C., area. MS-13 has been involved in trafficking young girls and involved in the death of a number of people.

Congress included important anti-gang increases in both the FBI and ATF in recent years. The fiscal year 2013 budget request includes no initiatives in the fight against gang violence and in fact proposes to terminate the National Gang Intelligence Center, which is the source of the statistics that I just cited.

What are you doing to fight the rise of gang violence, and why should we consider eliminating the very funding that is intended to better understand and address this issue? We see what has taken place. You know much more about it than I do, but we see what has taken place even down in Mexico and gangs that have impacted in neighborhoods in many of the largest cities and the gang impact that has taken place in Northern Virginia. Why would we do that to eliminate them?

Attorney General HOLDER. Well, Mr. Chairman, I think you are right that in terms of the otherwise good news that we have about the reduction of crime, the problem with regard to gangs is a glaring exception. It is something that we have to really focus on.

The Department is doing a variety of things. We have anti-gang task force operations involving ATF and the FBI. Our Office of Justice Programs has funded community-based anti-gang and violence prevention programs. We have prosecutions by the U.S. Attorneys' offices and by our Criminal Division, aimed at taking violent gang offenders off the streets.

I approved the plan to merge the Criminal Division's Gang Unit with the Organized and Racketeering Section to form the Organized Crime and Gang Section, which is allowing us to really use efficient ways at getting at the gang problem and understanding that some of these gangs have gone beyond gangs and street-level gangs. They have graduated to the point where I think they can be called organized crime. So we are trying to use our expertise in that regard.

We are proposing, as you indicate, to eliminate in the budget in 2013 the National Gang Intelligence Center. I don't think however that is going to hinder our ability to do the analytical work that was done there and then to share that work with people in the field. The responsibility for the production of that material will happen now at the field level, and they will be responsible then for pushing out to the field the analysis that was previously done by the NGIC.

Mr. WOLF. Is that an OMB proposal, or did that come out of the Justice Department?

Attorney General HOLDER. No, I think that is something we looked at in trying to make the determination as to where we might be able to save money and not lose the capacity that we had at NGIC, at the National Gang Intelligence Center.

Mr. WOLF. I don't think the committee will agree with you on that. I went out to the Bailey's Crossroads area one day a number of years ago, and I talked to the moms, who literally said their kids live in fear.

I come from an inner-city area in the City of Philadelphia. When a gang takes over a neighborhood, it is domestic terrorism. So I would hope that the Committee would not close down the National Gang Intelligence Center. I think it could be counterproductive, particularly with this 48 percent of the crime—violent crime—in most jurisdictions coming from gangs. But I was curious if it was coming out of the Justice Department or if it came out of OMB.

COUNTERTERRORISM TRAINING MATERIALS

I kind of covered this, but I will just read the question for the record and then I think we will follow-up since you agree with me and will help here. But I understand that last fall, the FBI conducted a review of all counterterrorism training materials. Reports indicated that this review resulted in the removal of 700 training documents that were found to be inappropriate.

Was this an FBI-only exercise, or was it the Department involved? You have led me to believe that it was the Department involved. You are aware of it. But we want you to submit an answer for the record, and we want to get outside people to take a look at that. So if you would tell Director Mueller that that is what we want to do, there may be some appropriate things you have taken out and then there may be some things that are inappropriate.

I was the author of the National Commission on Terror in 1998. That was before 9/11. I had been in Algeria. We had a company of Algerian military guarding us. About 200,000–300,000 people died of terrorist activities. Two hundred people that died in the Pentagon were from my district. The Bush administration ignored it, as did the Clinton administration, and I do not want to see that type of activity take place. But with your comments to the Director, we can take a look at that.

PRESCRIPTION DRUG ABUSE

Regarding my question on prescription drug abuse, we may just submit it again for the record, but I appreciate really what you did. Mr. Rogers told me that you followed up with him. I had forgotten about that exchange between you and Mr. Rogers, but it was really important.

Attorney General HOLDER. It was.

Mr. WOLF. We had a young man from Mr. Rogers' district here a number of years ago, and he was the son of a pastor. I remember he was sitting in the back of the room, and he was addicted to OxyContin. And he testified at the hearing. And then a couple of months later I asked how the boy was doing, and they said he had died. I think Mr. Rogers is onto something.

But anything we can do to help with regard to your setting up the national conference I think would be very helpful. So thank you for that.

Attorney General HOLDER. I think that idea of yours is something that we really should follow up with, because I actually do think that that would be a really good project, as I said, to raise the consciousness of the Nation. It is not a regional problem; this is a national problem.

Mr. WOLF. You are right, and we can work on that.

The next question I have, on meth lab cleanups, fits into the same. We will submit that for the record.

NATIONAL DRUG INTELLIGENCE CENTER

In the fiscal year 2012 bill, the Committee included \$20 million to be used only for the necessary expenses related to the closing of the National Drug Intelligence Center and the reassignment of necessary NDIC functions to other entities. Is that on track, and what functions did the NDIC transfer other agencies.

Attorney General HOLDER. Yes, that is on track. We only have money to keep the center open until June, but the thought would be that at least two of the functions of NDIC would be put in DEA, and those two I don't have in front of me, but I know—right. Two NDIC functions, the Document and Media Exploitation, DOMEX, and the production of major strategic reports would be realigned into DEA. This was a tough decision. It will save money, \$12 million in 2013, and will also generate efficiencies. And that is why we think with regard to those things that are most notable about NDIC, they can be done by DEA.

Mr. WOLF. And you don't think you will miss a beat?

Attorney General HOLDER. No. I think that the way in which this occurs, we will not have any gaps. I think we will do fine.

PRISONER ACCESS TO RADICALIZING MATERIALS

Mr. WOLF. There was a lot of talk about prisons earlier in the hearing. In the fiscal year 2012 conference report, the Committee instructed the Department of Justice to eliminate the ability of Federal prisoners to access radicalizing materials. What has the Department of Justice done to prevent prisoners from having access to radicalizing materials? Have the radical materials that were previously identified been removed?

Attorney General HOLDER. We are working on this. There is a report that we are in the process of preparing. We had a deadline, and as I understand it, there is a report that is supposed to be due.

There is a comprehensive list of material that is acceptable for prisoners to have, so one of the things that we can certainly submit to you are the list of those acceptable materials. But it is my understanding that there is a report that we are working on that apparently is due sometime in March, right? Yes, it is due sometime in March. We can submit that report to you.

Mr. WOLF. Okay, if you would. Are you working with the State prisons, too? Because some of them are having some of the same problems. I know the New York prison system did. And I think it would be helpful for the Bureau of Prisons to share this information, because you certainly have people that are very capable to

look at this, and I think you have FBI people assigned to it. I would suggest that you share that report with all of the State and local prisons.

Attorney General HOLDER. Yes. I think that is actually a good idea. I think the information flow can go two ways, because there are probably programs, analyses that have been done by State prisons as well that can help us with regard to making determinations of what actually does tend to radicalize prisoners and what does not. So I think the exchange of information would be useful.

Mr. WOLF. Could you tell the new director to do that.

Attorney General HOLDER. Right.

Mr. WOLF. I think there is an association that they have that they could share it through.

Attorney General HOLDER. If he is not already in touch with them in that regard, I will make sure that he does.

PRISON GROWTH

Mr. WOLF. Thank you. The BOP expects an additional increase of 11,500 inmates between fiscal year 2012 and the end of fiscal year 2013. What is the status of the ongoing and future prison activation and how will these activations affect your ability to absorb the projected prison population growth. Incidentally, I was sorry you hired somebody from within the Bureau of Prisons. I thought you should have gone out and gotten the most creative, dynamic person, whether it be from Kansas, Texas or Michigan, that has really worked with the Pew Foundation to deal with the issue of prison population growth.

The United States is number one in the world in percapita incarceration. I think we have now surpassed China even. And we can keep appropriating for more beds and more beds, but—

Attorney General HOLDER. Well, we actually did have a very wide search for the head of the Bureau of Prisons that included candidates from outside of the BOP. We actually were affirmative in reaching out to people who we thought, at least one person in particular, who I thought would be good at the job. So in the determination that we made, we looked at internal candidates as well as people from outside and made the determination that the candidate who we selected was the best coming from both of those fields.

We have four prisons that are coming online. We finished two from fiscal year 2012 in Berlin, New Hampshire and in Aliceville, Alabama; and then we have starting two activations in fiscal year 2013, Yazoo City, Mississippi, and Hazleton, West Virginia. So that will help us deal with the issue of these increasing numbers of people who are coming into the system. But we still are going to be struggling to maintain a safe level.

Mr. WOLF. And is that it? You don't expect to bring additional prisons online? For instance, what if you had been able to do what Texas did or what Michigan did, what would the impact be on the Bureau of Prisons? I am sure there are criminals in Texas and Michigan that are just as violent. So what would the impact be if you were to take that model and transfer it or translate it to the Bureau of Prisons? Has anyone looked at that with regard to size?

If you did everything that they have done in Texas, a red State, as you said—because I think maybe Nixon could go to China when Hubert Humphrey couldn't have gone to China—and put those things in practice in the Bureau of Prisons, what impact would that have on the Bureau of Prisons and what impact would that have on the numbers of the Bureau of Prisons?

Attorney General HOLDER. You mean in terms of those release policies?

Mr. WOLF. Right. If you did everything they have done in Kansas and everything they have done in Texas and Michigan and a few others, what would that impact be?

Attorney General HOLDER. It would be a tremendous impact, both in terms of the count and in terms of money savings that we would have. And I would hope that perhaps we can work together in that regard.

As I have mentioned and I will mention here, if we could reduce by seven days the number of days somebody would serve in a Federal penitentiary, we would save about \$41 million per year, without having any appreciable impact on public safety. And we are trying to work within the funds that we have to come up with ways in which we encourage prisoners to engage in vocational, educational, drug rehabilitation programs, and have as a carrot for that an earlier release, as we have seen in Texas and as we have seen in Kansas, I think that would a huge impact on recidivism, but also has a huge impact on the cost savings that we would have.

Mr. WOLF. Well, I agree. I wonder if anyone has looked at it to say what it would actually be. They reduced X number of prisoners in Kansas, and they have reduced the cost of X in Texas. If we translated that to the Bureau of Prisons, what would that mean? Another problem, that was raised earlier, is that for the fiscal year 2012 appropriations cycle, DOJ shared two new proposals designed to slow inmate population growth in our Federal prisons. One would increase the amount of time an inmate can earn for good conduct, and the other would provide sentence reduction credit for participation in educational and vocational. They were not embraced by the authorizing committee. I would have carried them. I think Mr. Fattah would have been supportive. We can't, if the authorizing committee says no.

So you really built a \$41 million offset in BOP budget that is not going to take place, and I am sure your budget people when they put it together knew it, but they just put a patch in there so they could send something up that made sense.

I have been involved in prison work over the years. That is not a good idea. That is not a good thing. It is not an authentic, honest, ethical, decent, moral budget. It doesn't work. It won't fix it. I think somebody should say, let's translate what was done in the various prisons and let's do it here and let that be your model that you come up with and work with.

Attorney General HOLDER. Well, one of the things I have told our new BOP head is that I want him to be innovative, creative, and I want him to look at contemporary solutions to the problems we are facing, and told him to look on the outside. That is one of the reasons I picked him, because I think he is a person who is not necessarily tied to the old ways, even though he comes from—

Mr. WOLF. Twenty years. I looked at his bio. He has been there since I think 1988, I think.

Attorney General HOLDER. Right. Even though he is an internal candidate, he is a person who I think is really going to be a person who breaks the mold and is not going to be tied to old ways of doing things. And we can't be, especially given the effectiveness we have seen of these other programs, and as I keep coming back to, the cost savings that we can generate in these tough budget times. I mean, it is a wonderful process where you can save money and increase public safety.

Mr. WOLF. Well, could you ask Pew or could you ask your budget people to do a back-of-the-envelope analysis of what has been done, not the most extreme, but the average thing that has been done in let's take five of the States and say that if you applied them to the Bureau of Prisons, what would the budget impact be and what would the impact be on the population and recidivism, if we could get you to do that?

Attorney General HOLDER. I am sure we could probably come up with some estimates. And what I would hope that we could get among Members of Congress is support for these ideas. You are a great supporter. I know Congressman Fattah. I suspect Mr. Schiff, Mr. Serrano as well. I am not sure that we would have—it will be a tough vote, tough to get the necessary votes to do this, but I think it is absolutely the right thing. So what we will put together is those estimates.

[The information follows:]

ESTIMATES FOR ADOPTING STATE PRISON REFORMS

Prisoner population growth remains a major driver of prison costs. Small policy changes can have a significant impact. For example, a 1% reduction in the current federal prison population would equate to an annual cost avoidance of nearly \$23 million for 2,200 inmates. If the federal prison population were reduced at the same rate that Texas (–0.7%) or Michigan (–6.7%) achieved from 2008 to 2009, then the cost avoidance could range from \$16 million to \$151 million.

However, many of the authorities states have employed to reduce prison populations are unavailable to the federal system, as is the case regarding parole rates; require significant investments, as is the case with expansion of residential treatment programs; or cannot be taken unilaterally by the Department of Justice, as is the case with sentence reductions. Nevertheless, the Department remains committed to working with Congress and other partners to develop new opportunities to reduce the prison population without threatening public safety, as indicated by the policies supported by the FY 2013 Budget, such as the \$13 million request to expand residential drug treatment, and legislative initiatives included in the pending Second Chance Act reauthorization, such as the earned sentenced reduction credits for good conduct and reentry program participation.

FEDERAL PRISON INDUSTRIES

Mr. WOLF. If you would, I would appreciate it. Last week I wrote you asking that you, as the administration official responsible for the BOP, work with other Cabinet Secretaries to complete a list of items that their agencies purchase that were made in China or other countries. The President should then direct that Federal agencies work with you to produce these items if they cannot be supplied from another U.S. manufacturer. There is ample opportunity to provide BOP inmates with valuable work opportunities producing items for Federal agencies that are no longer made in the United States.

I think your Bureau of Prisons made a terrible mistake last week on this case in which they were taking the jackets that were made for the President and other people and giving it the contract to Federal Prison Industries. That is not a good idea. There are enough products that are no longer made in the United States.

I think there is only one baseball cap manufacturer left in the United States, yet all the Federal agencies give out caps. NASA gives out caps. They all give out caps. And when you go and look at the cap, if you look at the back of it, it says "Made in China." I had a cap given to me by a very prominent person, not to embarrass him, so it wasn't Mr. Fattah, but it was somebody that served with Mr. Fattah, and I just looked in the back, and it said "Made in China."

Have you ever seen the bags that people have, the grocery bags—like World Market and Trader Joe's and Giant give out—the shopping bags that people take? You cannot get one of those bags that is made in the United States. Zero. None. The Bureau of Prisons could make that bag and yet not be in competition with an American company, could in essence create American jobs. We are trying to repatriate jobs. That I know, there are absolutely none. Then you would have the truck driver who drives the supplies up, the stitching, the knitting, the fabric, the cardboard cartons. It would all be creating domestic jobs.

So I think it really would take a bold imagination, but I think Mr. Schiff and most people on this Committee, would certainly stand with you to say we are not taking a job from an American. We are actually creating a job for two Americans. We are creating a job for the prisoner, because you can't put a man or woman in prison for 15 years and give them no dignity. (Work is dignity and training.) Then you would also be creating a job for an American.

I would hope you would embrace this and get behind this. Make sure you are not being criticized in the news. I am not speaking for you, but you should say you do not want to take any jobs away from American. You want to create jobs for Americans.

And, lastly, every American university, except for Notre Dame, now buys their hats from China. Look at all the hats there are. Hats in every college, every high school, every civic group, every Rotary Club.

So I think you could be the Esther for this time to do this. If you don't do it, I think people will be reluctant to do it, and it will not happen. So I hope—

Attorney General HOLDER. I think the point that you are making is a good one, and to the extent we can come up with areas, sectors that are not going to have—that will not have a negative impact on job creation in this country, I think that is a perfect niche for us.

I met with the Board of Directors of BOP about four or six weeks ago, to talk about this notion of repatriation. So what we will do is endeavor to find—we identified I think four things, but I am really fascinated by the caps and the bags possibility. So we will look at those as opportunities, as places where we might increase the use of prison industry resources. We have lost about 10,000 spots over the years in that regard, and if reentry is to be serious, I think giving people skills has to be an integral part of that.

Mr. WOLF. Thank you. We will be glad to work with you and stand with you if you do something there.

PRISON RAPE ELIMINATION ACT

A difficult issue, prison rape elimination. This was a bill that passed in 2003. It was Congressman Scott, Senator Kennedy, Senator Sessions and myself. In our April letter that Mr. Scott and I sent to you, we raised a number of concerns.

We strongly recommended that you revise the draft standard pertaining to independent audits of facilities. Specifically, we asked to you issue a regulation that requires independent and external audits of facilities every three years. Further, the fiscal year 2012 appropriation report included language urging the strong independent audit requirement in the final rules. Does the final audit standard comply with the request?

Attorney General HOLDER. We sent something over to OMB on November 30th, and they are in the process of working through that now. I don't know. I am not sure. We will have to get that to you, Mr. Chairman.

Mr. WOLF. Okay. Well, just to complete this, in the letter Mr. Scott and I also indicated your draft standards failed to comply with congressional intent because they did not apply to immigration detention facilities. PREA was drafted and passed with the intent to protect immigration detainees. We asked that you work with Secretary Napolitano to make sure that the national standards accomplish this. Did the final standards apply to immigration detention facilities?

Attorney General HOLDER. I have made a recommendation, and I am confident that in some form or fashion and consistent with the dictates of PREA, and I agree with your analysis of it, that immigration facilities will be covered.

Mr. WOLF. Good. I appreciate that. I don't know how much longer you are going to serve, but you really have to wrap this thing up. No, I don't mean today. I am not going to give you a hard time on it, but I have talked to people who have been raped in prison. And this bill passed in 2003. It was signed by President Bush. It was one of the few times I ever went to the Oval Office for a bill signing because I cared about it. That is nine years. A lot of bad things happened to a lot of people during that period of time.

I know there is resistance in the Bureau of Prisons. There was a resistance in the previous administration, too. But I hope we can wrap this thing up. It is something that when you walk out of here you can say that we accomplished. And I really need you to commit to it and say you are going to do it.

Attorney General HOLDER. As I said, we sent over our recommendation, what we think ought to be issued on November 30th. OMB is in the process of looking at it. My hope would be that something will come out relatively soon. I don't want to have this first term end without that being issued. And I think perhaps we can do it before that. My hope is that we will see something relatively soon.

Mr. WOLF. Okay. I have other questions.

Do you want to ask a couple?

Mr. SCHIFF. Thank you, Mr. Chairman. I just have one other area I wanted to inquire about.

VICTIMS OF TERRORISM ACT

Mr. Attorney General, the Victims of Terrorism Act was passed to facilitate the prosecution of cases involving the murder of Americans by terrorists. I have joined in a letter by two of my colleagues, Howard Berman and Joe Walsh, urging that the act be used to go after Americans who were murdered by terrorists in and around Israel. There have now been I think 54 Americans killed in the region. And as a result of the forced release of some of the Palestinian terrorists in exchange for Gilad Shalit, some of those responsible for killing or injuring Americans have been released. There is no double jeopardy or any other obstacle to our indicting them, seeking their extradition and prosecution.

I would like to get your thoughts on the opportunity to go after some of those responsible for killing our citizens and whether you will use this act to pursue those in that region. For some reason, the act has been employed to go after those that have murdered Americans in other parts of the world but for some reason not to go after Palestinian terrorists that have killed Americans.

Attorney General HOLDER. Well, we have open investigations in the Washington field office of American citizens who were killed in Israel. I expressed concern in a face-to-face meeting with my Israeli counterpart about people who were released in connection with the release of that Israeli soldier, who were involved in the killing of American citizens and was assured that we were going to work with them to try to determine where they were released to.

It is our intention to try to hold accountable, hold responsible, anybody who killed an American citizen wherever that occurred. There is not a blind spot that we have with regard to killings that occurred in Israel. Actually, to the contrary, we are being as aggressive there as we can in other places. And I expressed that to my Israeli counterpart. And as I said, there are matters that are open in the Washington field office and being looked at by the U.S. Attorney's Office here in Washington, D.C., in that regard.

Mr. SCHIFF. Thank you, Mr. Attorney General.

Thank you, Mr. Chairman.

OFFICE OF THE FEDERAL DETENTION TRUSTEE

Mr. WOLF. The U.S. Marshals Service, the budget request proposes to eliminate the Office of the Federal Detention Trustee and merge its activities and resources into the U.S. Marshals Service, resulting in the shift of \$1.7 billion in budget authority from the OFDT to the Marshals. Ten years ago, the Department proposed and the Committee approved the establishment of a detention trustee in response to inadequate planning and management of detention needs, and unreliable estimates of resources requirements. Why are you proposing its elimination, and are there any savings that go with it?

Attorney General HOLDER. Yes. We project savings in the first year at about \$5.6 million. We actually think that we can streamline this process by bringing into the Marshals Service what the detention trustee does. It doesn't mean the detention trustee func-

tion will cease to occur. It will just happen within the Marshals Service where there is co-location, there are efficiencies that happen there. But we actually think that this will streamline the detention management process and will not have an operational impact and will have a cost savings, as I said, in the first year of \$5.6 million.

OBSCEITY ENFORCEMENT

Mr. WOLF. Okay. Obscenity enforcement. The Committee supports the work of the Department in investigating and prosecuting major producers and distributors of hard core adult pornography that meets the test for obscenity as defined by the Supreme Court.

Last year, the committee expressed concern that merging the responsibilities of the obscenity prosecution task force into the child exploitation and obscenity section of the criminal division might weaken adult obscenity enforcement. We await your report on adult obscenity investigations and prosecution. But do you have any statistics you can share today that can prove that over the past year the responsibilities that have been assigned to the task force have not been diminished by the reorganization?

Attorney General HOLDER. I don't have any statistics that I can share with you, but I can come up with some. But I can tell you that the merger has not impacted our desires to go after appropriate adult obscenity cases. Our emphasis, I will be very frank with you, is on cases involving children. I will note that there is a major case that is starting, I believe, either today or tomorrow in Los Angeles, the Isaacs matter, that involves adult obscenity, and that is an example of what we are doing in that regard. I can get you more information. But there has not been a diminution of our focus on that given as a result of the merger.

[The information follows:]

OBSCEITY ENFORCEMENT

The Department of Justice will submit the obscenity-related criminal caseload statistics report, as requested. Obscenity cases are investigated and prosecuted by the United States Attorney's Offices (USAOs), the Criminal Division's Child Exploitation and Obscenity Section (CEOs), and—during its existence from May 2005 through December 2010—the Obscenity Prosecution Task Force (OPTF). The Department has been and remains committed to bringing obscenity prosecutions where appropriate. In FY 2011, the Department filed 66 cases, charged 66 defendants, and had 74 cases pending, 70 defendants pending, 75 cases terminated and 76 defendants terminated. These cases included an alleged violation of at least one of the following statutes: 18 U.S.C. 1460 (possession with intent to sell, and sale, of obscene matter on federal property); 18 U.S.C. 1461 (mailing obscene or crime-inciting matter); 18 U.S.C. 1462 (importation or transportation of obscene matters); 18 U.S.C. 1463 (mailing indecent matter on wrappers or envelopes); 18 U.S.C. 1464 (broadcasting obscene language); 18 U.S.C. 1465 (production and transportation of obscene matters for sale or distribution); 18 U.S.C. 1466 (engaging in the business of selling or transferring obscene matter); 18 U.S.C. 1468 (distributing obscene material by cable or subscription television); and 18 U.S.C. 1470 (Transfer of Obscene Material to a Minor).

With very few exceptions, cases that involved only adults producing, receiving, distributing, or otherwise exchanging adult obscenity were prosecuted either independently by a USAO or jointly by a USAO in conjunction with either CEOs or the OPTF. While there was not a new "adult-only" obscenity case filed in FY 2011, (there was a superseding indictment obtained on April 14, 2011, in a pending case), this was not a dramatic departure from the number of these cases filed in the previous two fiscal years. In reincorporating OPTF into CEOs, the Department took into account CEO's long-standing track record in successfully prosecuting child ex-

ploitation and obscenity cases, its strong relationships with federal law enforcement agencies, and its previous work with these agencies (most notable the United States Postal Inspection Service and the FBI) on obscenity cases. The Department believes that CEOs, in conjunction with the USAOs around the country, has and will continue to effectively discharge these responsibilities. Finally, we believe the reincorporation of OPTF's responsibilities within CEOS will allow us to most effectively leverage our resources.

Mr. WOLF. Okay. If you would, I would appreciate that.

HUMAN TRAFFICKING AND SLAVERY PROSECUTION

Human trafficking and slavery prosecution. How much does the budget propose to allocate for operation of the human trafficking and slavery prosecution unit within the Civil Rights Division for fiscal year 2013? In fiscal year 2012, the Committee directed DOJ to maintain funding at the fiscal year 2011 level. It is my understanding that you may not be currently in compliance with that direction. If I am right, why is that the case? And if I am wrong, explain.

Attorney General HOLDER. We experienced attrition during fiscal year 2011 due to a difficult fiscal year 2011 appropriations bill, including continuing resolutions, and late enactment, so that resources and people that they started the year with were less by the end of fiscal year 2011. We are maintaining the current level and share the committee's priority in this area. But the unit in the Civil Rights Division actually did more with less. We hit record numbers of cases charged in fiscal year 2010. In fiscal year 2012 we got \$3.2 million; in fiscal year 2011, \$3.7 million. So there was a \$500,000 difference there, a four attorney difference.

So I think that we are trying to meet the standard that has been set. But the problems that we had with regard to maintaining funding were a result of the budget experience that we had in fiscal year 2011.

Mr. WOLF. So there is not any diminishing of interest on your part?

Attorney General HOLDER. No. In fact, I plan on giving not a major address, but a significant speech on human trafficking sometime over the next two months or so.

Mr. WOLF. Where will that be? To what group?

Attorney General HOLDER. We haven't picked the place yet, but I picked I guess three or four things that I really want to bring attention to. I am going to give a national security speech on Tuesday in Chicago, and one of the other ones that I wanted to give and that we are going to do has to do with human trafficking.

Mr. WOLF. Well, I have given Neil MacBride a list of 80 human trafficking centers in the Northern Virginia–Shenandoah Valley area, and if you talk to the people involved, it is all over. But it is also all over New York. It is all over, so it is a big issue and one that really doesn't get the attention. Have you talked to the people at the Polaris Project?

Attorney General HOLDER. I am familiar with them. I have not—I don't think I have—had conversations with them.

Mr. WOLF. Well, I think before you give your speech, you ought to work with the Polaris Project. They run the national hotline. And I think if you are going to give a major speech, they can help you and make sure you get it right.

Attorney General HOLDER. We will touch base with them. And I think it is interesting that I think and very appropriate that you mentioned Neil MacBride. He had a particular success in a case involving a man who was prostituting a young girl, I think 12–13 years old.

Mr. WOLF. MS–13. I saw the case.

Attorney General HOLDER. And got a very significant sentence. I think Neil has done a particularly good job in this regard.

Mr. WOLF. I think you should do more though. I mean, this is someone's daughter; this is someone's sister.

Attorney General HOLDER. Yes.

Mr. WOLF. I mean, this is really slavery. We go around the world, and we tell people that in Kenya or in whatever, but it is in River City. It is in the Nation's Capital. If you talk to Polaris, they can give you literally the addresses of where it is in this region. Polaris could give you the list and tell you how they came up with the list. So I think there ought to be a little bit more of passion to eradicate it.

HUMAN TRAFFICKING TASK FORCES

Now, in the fiscal year 2012 appropriations bill, we require that each U.S. Attorney establish a human trafficking task force or participate in a joint U.S. Attorney–led trafficking task force. We heard there was some pushback from this. What is the status of these task forces and what are you doing to make sure they all get the message? I guess your speech could help them get the message. Have you put out a—what do you call it when you send something out to the U.S. Attorneys?

Attorney General HOLDER. A directive to the field.

Mr. WOLF. Have you sent a directive to the field on this issue?

Attorney General HOLDER. I don't believe that I have, and I will have to check on the status of those, but the passion that you have expressed in this area is one that I share, and it is the reason why I picked that. In addition to national security, the voting rights speech that I gave, this is something that I think is worthy of an Attorney General's speech, and we will try to build up all the attention that we can get surrounding it. It is something that I hope will be a legacy for this Justice Department.

I meet with the Secretary of State on a yearly basis and other people and we talk about human trafficking in other countries and what our Nation's efforts are in that regard. But I think you are exactly right. I have met with advocates about this issue in my office and heard horror stories about the way in which young women, young girls, are used in this country.

Among the things that is most disturbing is to see that when you have major events, you have women, girls, being brought to those events, everything from Super Bowls to political conventions, and we work to ensure that at least one publication stopped advertising for those kinds of services, and we are working with others as well. Again, working with advocates to try to come up with this. That is why I said this speech is something very near and dear to my heart.

Mr. WOLF. Well, let us know. There are actually newspapers in the country that on the sporting page carry the ads, some prominent papers, too.

Attorney General HOLDER. That is exactly right.

Mr. WOLF. What would happen if you were a U.S. Attorney and you didn't follow through with this? Because we have directed that everyone be part of a task force. If by June 1st, what would happen to a U.S. Attorney that didn't have this? For the record, if you can say that. I might send your comment to every U.S. Attorney. We have them in a mailing list. What would happen to a U.S. Attorney if he did not have a task force?

Attorney General HOLDER. Well, I will have to tell you that my experience has been, having been a U.S. Attorney, that once you get a directive from an Attorney General, you comply with it. I have never had an instance where a U.S. Attorney did not comply, and I certainly never thought of not complying with an Attorney General directive.

Mr. WOLF. I think there are some that have not, and there is language in the bill that requires it.

Attorney General HOLDER. We will check.

Mr. WOLF. And if you could let us know if you send out a directive, too, I would appreciate that.

Attorney General HOLDER. We will check to see where we are in terms of compliance and whether there is the need for a directive. [The information follows:]

U.S. ATTORNEY'S TRAFFICKING TASK FORCES

In order to most effectively implement the directive that each United States Attorney's Office establish or participate in a U.S. Attorney-led human trafficking task force, the Department surveyed all 94 United States Attorneys' Offices about their human trafficking work, including their participation in task forces. At this time, approximately two thirds of the United States Attorneys' Offices are participating on or leading task forces that address human trafficking. Many of these task forces were developed based on the Department's Human Trafficking Enhanced Enforcement Initiative that was launched January 2011, including six pilot interagency Anti-Trafficking Coordination Teams (ACTeams) designed to streamline coordination among federal investigative agencies and federal prosecutors. In addition to the United States Attorney, participants from the United States Attorneys' Offices may include prosecutors, law enforcement coordinators, and victim assistance personnel. The task forces include those that are purely operational with "on the ground" law enforcement personnel and prosecutors; task forces comprised of federal, state and local leaders focusing on regional coordination and information sharing; and task forces primarily addressing trafficking victims' unique needs. Membership generally includes federal law enforcement partners, state and local law enforcement, and various non-governmental organizations, including those providing victim services. Using information gleaned from the survey, the Department's next step will be to work with the other United States Attorneys' Offices to identify the human trafficking issues in their particular districts and to assist them in developing or participating in appropriate new or existing task forces.

Mr. WOLF. And should I tell the Polaris people that you are going to call them?

Attorney General HOLDER. Sure, we will touch base with them in anticipation of the speech.

Mr. WOLF. Right. Okay.

INTERPOL RED NOTICES

An INTERPOL red notice is the closest instrument to an international arrest warrant in use today. In January, MSNBC reported—you must watch MSNBC?

Attorney General HOLDER. Yes, I confess.

Mr. WOLF. Okay, I watch Fox.

They reported that human rights activists believed that dictatorships and other oppressive regimes have fabricated criminal charges against opposition activists who have been given refuge in other countries and then sought their arrest by obtaining red notices from INTERPOL. In light of these allegations, and recognizing that INTERPOL–Washington is merely the official U.S. point of contact with the International Criminal Police Organization, what measures can DOJ or INTERPOL–Washington employ to help prevent rogue states from using the system to harass or detain political dissidents?

Attorney General HOLDER. Yes. The INTERPOL Constitution really explicitly prohibits the use of red notices in that regard. There are a system of procedures and safeguards that INTERPOL has in place to help ensure compliance with its rules. Now, the U.S. is one of the most active members of INTERPOL. Ron Noble is the head of INTERPOL—

Mr. WOLF. Is he still the head of it? Is he in France?

Attorney General HOLDER. Still in France, a person whom I know quite well. And to the extent there is a problem, I think that based on the personal relationship that I have with him, but also given the prominence of the United States in the organization and given the explicit rules that exist in that regard, that we can bring weight to bear to ensure that those notices are not being used in that way.

Mr. WOLF. Would you call him and tell him? I mean, we can carry language. How much is the funding—I forget the exact amount—for INTERPOL coming from the Congress? But there have been a number of other cases. There was one case with regard to Saudi Arabia potentially. There was another case with regard to maybe the Philippines. There were some other cases.

Attorney General HOLDER. I would say there are processes within INTERPOL for somebody where a red notice has been issued involving a person for a person to challenge the imposition or the issuance of that red notice. But having said all of that, this is something that we can look at, and I will talk to our people at INTERPOL. Let me talk to our representatives to INTERPOL and see what their assessment is.

Mr. WOLF. It is \$30 million in fiscal year 2012. And I think that we should carry language in the bill, because I don't think a good thing should be used to do a bad thing. And are all the countries of the world part of INTERPOL?

Attorney General HOLDER. I don't think so. I am not sure what the numbers are. I don't think all nations are members of INTERPOL.

Mr. WOLF. Okay. That pretty much—I have some other questions for the record. The financial mortgage fraud you covered.

FOREIGN AGENTS REGISTRATION ACT

There is one other one that is very important. I am concerned that your Foreign Agents Registration Unit at the Justice Department, which is responsible for the enforcement of the Foreign Agent Registration Act, is not being as aggressive as it should be in enforcing the law.

As you know, the Foreign Agent Registration Act, FARA, was enacted in 1938. FARA is a disclosure statute that requires persons acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of their relationship with foreign principals, as well as activities, receipts and disbursements in support of those activities, end of quote.

It is my understanding that a large number of FARA cases were brought during the Cold War, and especially during the Reagan Administration, but very few have been pursued over the last two decades, including during this administration. In fact, this administration has allowed the genocidal government of Khartoum and bin Laden—they invited bin Laden in, as you know, for four or five years—which is responsible for the atrocities in Darfur, where about 300,000 people died, and now they have even hired a lobbyist, Bart Fisher, to represent Sudan in Washington.

In December, and I wrote Secretary Geithner after Fisher was granted a license by the Treasury Department's Office of Foreign Assets Control, OFAC, to represent the government. As the representative of a foreign government, has Mr. Fisher registered under FARA with the Justice Department, and, if not, why, and will your office enforce any violation of FARA?

Attorney General HOLDER. I am not aware of whether he has or has not. Given the fact that you have raised that issue, it will be something that we will examine, and then to the extent that we can appropriately share information with you, we will do so. It may be, and I want to be fair to him, it may be that an investigation would ensue and we might not be able to share information, or it may be that he has complied, in which case I suspect we could probably share that information with you.

[The information follows:]

FARA REGISTRATION

The Department of Justice is committed to vigorous enforcement of the Foreign Agent Registration Act. With respect to your questions about Mr. Bart S. Fisher, the Law Office of Bart S. Fisher, Registration No. 6076, registered pursuant to the Foreign Agents Registration Act, as amended, 22 U.S.C. §611 et seq. (FARA), for the Embassy of the Republic of Sudan on November 10, 2011. Mr. Fisher filed a short form registration statement under FARA on November 10, 2011 and an updated statement on January 18, 2012. All registration documents, including Mr. Fisher's agreement with the Republic of Sudan, are available for review at <http://www.fara.gov>.

Mr. WOLF. Well, I appreciate you want to be fair to him. I want to be fair to the women in the camps where I visited last week who are literally being bombed and raped and killed. So, in essence, Bart Fisher represents the Khartoum government, represents Bashir, who is an indicted war criminal. And when I was in Darfur, the women told me when they were being raped, they were being raped by a man who said they wanted to make a lighter-

skinned baby. So Bart Fisher is connected to a pretty bad group of people.

So, in fairness, who represents the women in the camps? And as I mentioned a while back, during the Kosovo situation, I was one of the Republicans that supported President Clinton in his efforts with regard to Kosovo. As the people poured across the border of Kosovo, they are pouring across the border now. And the very thought—and Geithner will literally have blood on his hands for permitting this to take place. The head of OFAC will literally have blood on his hands.

Now, if a tree falls in a forest and nobody sees it and nobody hears it, maybe they don't think it fell. But I know it fell, and so I am asking you to kind of look at this thing, because this also deals with a lot of other issues.

They are allowing Bashir to travel. He is an indicted war criminal. If you remember, Milošević could not travel anywhere. Bashir travels to China. He travels to Kenya. He traveled to Turkey. We, the world, tracked down Milošević, Karadzic and Mladić. The Clinton administration was committed to that; the Bush administration was too. Nobody is trying to do that to this person. And he went to Malawi a while back, and we are giving Malawi \$300 million in a Millennium Challenge Grant.

So this is really important. You can do a lot of good, and I think you are obligated here to kind of look at this thing. So as you talk about the fairness to Bart Fisher, if you go on my Web page, you can see the women that I would like you to be fair to, too. You have an obligation to make sure that a genocidal regime does not have somebody that is not in compliance with FARA. And quite frankly, when you are at the next Cabinet meeting, you ought to tell the President and you ought to tell the Secretary of Treasury that history will judge; what is coming out will be viewed by the world.

Ann Curry from The Today Show was up there in the camp, and I would ask you to read Nicholas Kristof's last three columns in the *New York Times*. And then if you could just kind of move on this or tell us what you find and what you can tell us and whether or not they are going to continue this or not, I will appreciate it.

We have lost everybody. It is just you and me. So with that, unless you have anything else for the record, we will conclude——

CONCLUSION

Attorney General HOLDER. No. I would just say I want to thank you, Mr. Chairman, for the manner in which this hearing was conducted. I think it was substantive. It was respectful. I certainly hope I was respectful. I certainly felt respect coming from the Members of the Committee. I think the questions were pointed and legitimately so at times.

I think it was a good exchange of information, and you have left me with some thoughts about a couple of issues, not the least of which is the last one that you raised. And I hope that we can work together on issues that are of mutual concern to us. I think about Prison Industries among them and this whole question of new ideas in the Bureau of Prisons, that perhaps we can forge a bipartisan alliance to change some old thinking.

Mr. WOLF. Well, my office is always open. I will tell you, sometimes I do write you. I know your mail room mustn't get the letter up to you, but I never get the answer. So on these issues, they are issues that I care deeply about. That is why I am on this Committee and not on other committees. So I don't think there is any partisanship on the Bart Fisher issue or on the Prison Industries or on those. So, you know, I would be open to work with you and I appreciate your testimony.

With that, the hearing is adjourned. Thank you.

Attorney General HOLDER. Thank you, sir.

QUESTIONS FOR THE RECORD—MR. WOLF

DEA METH LAB CLEANUPS

Question. Unlike last year, this year's budget includes funding for DEA to provide assistance to States and localities for Meth lab cleanups. You are requesting \$12.5 million. In FY11 the program was temporarily suspended, then late in the year the decision was made to only fund container program cleanups. The program is currently funded at \$12.5 million. Is \$12.5 million sufficient to fully meet the lab cleanup needs in FY12 and in FY13? And how do you intend to operate the program? Will funding go only to States with a container program?

Answer. If container program expansion continues as planned and there is no significant growth in cleanup requests, the \$12.5 million will be sufficient to meet anticipated state and local meth lab cleanup requests in FY 2012 and FY 2013.

In FY 2011, DEA adjusted how it operated the state and local cleanup program and suspended cleanups for approximately 12 weeks for states participating in the container program. In FY 2012, DEA is funding cleanups for all container states for the entire year and is making contractor cleanup services available for other states beginning in March 2012. Currently, eight states have operational container programs (Arkansas, Kentucky, Tennessee, Oklahoma, Nebraska, Illinois, Indiana and Alabama), and DEA is working with five other states (Michigan, Mississippi, North Carolina, Ohio, and Virginia) to implement the container program during FY 2012. DEA expects these additional five states to have operational container programs in FY 2013.

Under DEA's container-based cleanup program, DEA trains and certifies law enforcement officers to remove gross contaminants from lab sites; secure and package the waste pursuant to state and federal laws and regulations; and transport the waste to a secure container where it is stored with additional labs until a hazardous waste contractor can remove it for disposal. Thus far, the program has resulted in significant cost savings per lab in states that have the containers deployed; a contractor cleanup averages \$2,230 while a container cleanup averages \$320.

As container programs are more cost efficient and more states have operational container programs in FY 2013, \$12.5 million in funding is sufficient in FY 2013. DEA has also contacted an additional eight states for potential container program expansion. For those states without container programs, DEA assesses whether or not the program is a cost effective option. If the state has only limited cleanups, the upfront equipment and training costs can

exceed potential container program savings. In these cases, DEA will provide cleanup services through its hazardous waste contractors.

FEDERAL BUREAU OF INVESTIGATION

Question. What is DOJ's policy regarding U.S. Attorneys attending meetings with members of the Council on American-Islamic Relations (CAIR)?

Answer. The Department of Justice has no formal policy governing the engagement of the United States Attorneys' Offices with CAIR representatives or members. The U.S. Attorney community, however, is well aware of the FBI's policy regarding its own interaction with CAIR and, as a result, before engaging with CAIR, U.S. Attorneys' Offices usually consult with their respective FBI districts.

WIRELESS COMMUNICATIONS

Question. In 1998, Congress directed DOJ's law enforcement components to consolidate their separate efforts to replace their respective Land Mobile Radio systems. In 2008, the Integrated Wireless Network (IWN) investment plan was initiated to direct the planning, deployment, and maintenance of a tactical wireless radio system for DOJ law enforcement components. However, your budget proposes to decentralize funding for DOJ's radio program and transfer base operations and maintenance funding back to the components. Are we seeing the end of DOJ's strategic plan for a tactical wireless radio? Will there still be an interoperability program?

Answer. The Department remains committed to modernizing its land mobile radio capabilities. However, the FY 2008 strategy has been modified to accommodate the current budget environment. The Department has adopted a modernization plan that upgrades the Federal Bureau of Investigation (FBI) existing wireless infrastructure and adds sufficient capacity to allow the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Drug Enforcement Administration (DEA), and the U.S. Marshals Service (USMS) to migrate to the shared system. Under this new plan, the Justice Management Division (JMD) continues providing oversight and strategic direction. Leveraging and consolidating onto the FBI's existing infrastructure allows for consolidation of engineering resources, with the FBI assuming the role as service provider for the Department's shared system for the benefit of all the components. The plan also encourages the use of state and local systems, where those systems meet Department requirements and it is cost effective to do so. Upgrading the FBI infrastructure is more cost effective compared to the FY 2008 strategy. Interoperability is a key attribute of the modernization

plan. The Department achieves interoperability with other public safety radio systems in four ways. First, upgraded systems are compliant with Project 25 (P25) common standards, which enable interoperability with other agency partners using P25-compliant equipment operating in the same frequency bands. Second, the Department executes agreements to use radio systems operated by state and local agencies. Third, the Department utilizes shared mutual aid radio channels, including DOJ's Federal Interoperability Channels, in key metropolitan areas such as New York City. Radios from participating agencies (e.g., FBI New York City field division, New York City Police Department) are programmed to operate on the mutual aid channels, thus ensuring personnel from different agencies can communicate radio-to-radio when needed. Fourth, the Department achieves interoperability by procuring multi-band radios. Multi-band radios enable law enforcement personnel to operate on bands used by state and local law enforcement, as well as on bands utilized by federal law enforcement.

Question. Since 2008, the Wireless Management Office has overseen tactical wireless communications. What office will oversee the strategic planning, spectrum management, and interoperability aspects if operations once again become the responsibility of the several law enforcement components?

Answer. The JMD Wireless Management Office will transition responsibility for the modernization and service delivery functions to the FBI. However, JMD will maintain a small cadre of employees to oversee strategic planning and spectrum management and to support the Wireless Communications Board, which will remain in place as the governing body. In its spectrum management role, JMD will continue to serve as the single point of contact with the National Telecommunications and Information Administration and other outside organizations regarding spectrum and wireless communications policy and issues including the nationwide Public Safety Broadband Network.

Question. What value will be gained by decentralizing the efforts to upgrade and transition these systems?

Answer. Leveraging and consolidating onto the FBI's existing infrastructure is a more cost effective strategy. This approach takes advantage of the FBI as a "center of excellence" and allows for consolidation of engineering resources, with the FBI assuming the role as service provider for the Department's shared system for the benefit of all the components. By rearranging resources, we are able to implement our new strategy taking advantage of and capitalizing on the expertise that the FBI already has with this system. Providing the operations and maintenance (O&M) funding directly to the components is

more efficient because it eliminates the need to set up annual reimbursement agreements to pass the O&M funding back to the components.

Question. Will this realignment prioritize FBI's wireless radio system over that of the ATF, Marshals Service, and DEA?

Answer. As noted, JMD will maintain an oversight role and continue to support the Wireless Communications Board (WCB), which will remain in place as the governing body. In its oversight role, JMD will work with the components to coordinate the prioritization and use of the funds and will provide recommendations to the WCB, which will direct how the funds are spent.

Question. How will FBI's shared system serve as a platform for consolidation of all four law enforcement components?

Answer. The FBI's existing infrastructure is being upgraded, with the existing wideband equipment being removed and replaced with narrowbanded AES-encrypted infrastructure. In addition, channel capacity is being increased to allow for the transition of ATF, DEA, and USMS (where not already transitioned) to a consolidated shared system in each of the FBI's divisions. Modernization projects are already funded and underway in 13 of the FBI divisions. As funding becomes available, the Department's deployment strategy addresses priority areas based upon the age of the existing systems, the threats within an area of responsibility, and the availability of funding to complete an area with infrastructure upgrades and provide the needed radios.

Question. Your budget proposes to reduce funding for the Prison Rape Prevention and Prosecution Program by \$2 million or 16 percent. With the standards about to go into effect, why reduce funding for a program that supports efforts to prevent and eliminate prisoner rape between inmates in state and local prisons, jails, and police lockup facilities?

Answer. Although our FY 2013 request is lower than the FY 2012 enacted level, the total amount of spending is expected to be higher than in FY 2012. This is because the National Resource Center for the Elimination of Prison Rape, which the Department established via a cooperative agreement to provide technical assistance to help states and localities come into compliance, has been funded for a three-year period and will spend in FY 2013 a significant amount of its previously-appropriated money on such efforts.

IMMIGRATION COURTS

Question. The budget request for the Department of Homeland Security, Immigration and Customs Enforcement, would permit ICE to transfer up to \$5 million to DOJ's Executive Office for Immigration Review "to increase the efficiency of the immigration court process." If DHS were to provide these funds, how could DOJ utilize them in order to increase immigration court efficiencies? What specific activities would be supported?

Answer. The 2013 budget requests \$5 million for U.S. Immigration and Customs Enforcement (ICE) that can be transferred to the Department of Justice, Executive Office for Immigration Review (EOIR). These funds are requested as part of the proposed expansion of the ICE Alternatives to Detention (ATD) program to assist EOIR in efficiently processing the cases of individuals on the non-detained docket. EOIR has identified several ways in which the funding may be used to increase efficiencies in processing non-detained cases. EOIR may use the funds to increase the number of immigration court and Board of Immigration Appeals support staff, offset the growing cost of court interpreters, and fund new information technology projects to maximize efficiencies in case filing and processing. In addition, EOIR could use some of the funds to increase docket flexibility by increasing video teleconferencing capability, so that cases can be heard by judges in different locations, and by temporarily deploying judges to hear non-detained cases in multiple locations.

Question. And why not simply ask for an increase in the appropriation for immigration courts? Why a transfer from DHS?

Answer. The 2013 budget requests \$5 million for U.S. Immigration and Customs Enforcement (ICE) that can be transferred to the Department of Justice, Executive Office for Immigration Review (EOIR). These funds are requested as part of the proposed expansion of the ICE Alternatives to Detention (ATD) program to assist EOIR in efficiently processing the cases of individuals on the non-detained docket. EOIR has identified several ways in which the funding may be used to increase efficiencies in processing non-detained cases. EOIR may use the funds to increase the number of immigration court and Board of Immigration Appeals support staff, offset the growing cost of court interpreters, and fund new information technology projects to maximize efficiencies in case filing and processing. In addition, EOIR could use some of the funds to increase docket flexibility by increasing video teleconferencing capability, so that cases can be heard by judges in different locations, and by temporarily deploying judges to hear non-detained cases in multiple locations.

U.S. ATTORNEYS

Question. Did DOJ sent a directive out to U.S. Attorneys regarding human trafficking task force participation. Are all U.S. Attorneys complying with the requirement?

Answer. In order to most effectively implement the directive that each United States Attorney's Office establish or participate in a U.S. Attorney-led human trafficking task force, the Department surveyed all 94 United States Attorneys' Offices about their human trafficking work, including their participation in task forces. At this time, approximately two-thirds of the United States Attorneys' Offices are participating on or leading task forces that address human trafficking. Many of these task forces were developed based on the Department's Human Trafficking Enhanced Enforcement Initiative that was launched by the Attorney General in January 2011, including six pilot interagency Anti-Trafficking Coordination Teams (ACTeams) designed to streamline coordination among federal investigative agencies and federal prosecutors. In addition to the United States Attorney, participants from the United States Attorneys' Offices may include prosecutors, law enforcement coordinators, and victim assistance personnel. The task forces include those that are purely operational with "on the ground" law enforcement personnel and prosecutors; task forces comprised of federal, state and local leaders focusing on regional coordination and information sharing; and task forces primarily addressing trafficking victims' unique needs. Membership generally includes federal law enforcement partners, state and local law enforcement, and various non-governmental organizations, including those providing victim services. Using information gleaned from the survey, the Department's next step will be to work with the other United States Attorneys' Offices to identify the human trafficking issues in their particular districts and to assist them in developing or participating in appropriate new or existing task forces.

CRIMINAL DIVISION—INTELLECTUAL PROPERTY PROTECTION

Question. Your request supports an increase of \$5 million and 14 positions—including six International Computer Hacking and Intellectual Property (ICHIP) coordinators—to combat international piracy of intellectual property. Six of these positions will be cross-designated as DOJ Attachés at overseas posts. How will these positions help DOJ address IP threats and stop attacks from abroad?

Answer. The six International Computer Hacking and Intellectual Property (ICHIP) Coordinators would provide critical resources that would enable the Department to more effectively combat the increasing IP and cyber crime

threats developing overseas, including in cases like Megaupload, through enhanced and sustained international engagement. As contemplated by the program and described in greater detail below, such efforts would increase the number and scope of coordinated international IP and cyber prosecutions, build foreign capacity to prosecute such cases abroad, and help prosecutors make stronger cases in the U.S. by facilitating information and evidence sharing. This would significantly increase our ability to stop the crime at its source. The scope of the ICHIPs' responsibilities would build on the successful aspects of the Intellectual Property Law Enforcement Coordinator (IPLEC) program as well as the domestic Computer Hacking and Intellectual Property (CHIP) Coordinator program in which specially trained Assistant U.S. Attorneys are available in each district.

It is incontrovertible that combating IP crime and cyber crime is essential to safeguarding our national and economic security, creating economic growth, and ensuring integrity, fairness, and competitiveness in the global marketplace. In today's environment, however, where virtually every significant IP crime and cyber crime investigated and prosecuted in the U.S. has an international component, it is impossible to address such crimes adequately without sustained and strong international engagement. Operating from abroad, often beyond the reach of U.S. law enforcement, today's IP and cyber criminals are more technologically savvy than ever. They exploit new technology to develop increasingly sophisticated and diverse methods of committing every imaginable type of IP and cyber offense, including widespread online piracy, increased sales of counterfeit network hardware and other counterfeit goods that can threaten our national security and economic prosperity, corporate and state-sponsored economic espionage, and computer intrusions that can threaten national security or compromise and exploit personal and financial data. These types of crimes are also increasingly the province of organized criminal enterprises. In many cases, such crimes also overlap substantially with other economic crimes, including fraud, money laundering, tax evasion, and smuggling.

The Department has sought to address the international aspects of IP and cyber crime by making its efforts to strengthen international law enforcement relationships a top priority. These efforts are designed to increase cooperation and evidence sharing in criminal cases and to build capacity in foreign countries to prosecute these offenses. Building such foreign capacity would reduce the number of safe havens around the world for IP and cyber criminals and overcome jurisdictional and resource limitations in prosecuting crimes originating overseas.

The Department has also collaborated with other U.S. agencies and foreign law enforcement counterparts in this area through multi- and bilateral working groups as well as through multi-year training and technical

assistance programs for foreign law enforcement, judiciary, and law makers. These efforts focus not only on law enforcement capacity building, but also on improving statutory regimes to ensure that law enforcement has the legal tools needed to respond quickly to the threat of Internet-based crime and the proliferation of electronic evidence in a wide range of offenses.

Based on over a decade of experience in these areas, it has become clear that being able to address threats at the source is a highly effective method to reduce IP and cyber crime. For example, working with foreign law enforcement to shut down a factory producing counterfeit pharmaceuticals can provide greater protection to the consumer than attempting to seize every individual package shipped from that factory into the U.S. Similarly, working closely with foreign counterparts to disrupt criminal networks that undertake phishing scams or deploy malicious code through viruses in the country of origin will often result in quicker results and greater deterrence than seeking to gather evidence and extradite defendants through traditional processes.

Placing ICHIP Coordinators in six critical areas will improve the ability to coordinate the Department's international efforts to suppress IP and cyber crime. Although instances of international crime may be addressed effectively by direct contact between prosecutors and investigators on specific cases, to address systemic and pervasive international IP crime and cyber threats effectively, greater and more sustained engagement is essential. The ICHIP program is an extension of the Department's IPLEC Program, through which the Department has deployed experienced federal prosecutors overseas since 2006 to take the lead on our intellectual property protection efforts in key regions including Asia and, until March 2011 (when State Department funding expired), Eastern Europe. Through the IPLEC program, the Department has seen a substantial increase in foreign enforcement and cooperative casework where U.S. law enforcement has had a visible and ongoing presence in the most active countries or regions. This budget item would allow for the expansion of the program to additional critical regions, and also to cover the rapidly developing and overlapping area of international cybercrime.

Question. How can some of the best state prison reforms/policies be replicated to impact Federal prison population and costs?

Answer. Many of the state reforms and policies with the most beneficial impacts on the prison population revolve around successful reentry, which is linked to decreased recidivism, increased public safety, and a long-term decrease in the prison population. Investments in robust reentry programs today will, in later years, directly result in prison cost savings and yield safer communities. Unfortunately, the levels of crowding and an increasing number of inmates make far more difficult the delivery of effective recidivism-reducing

programming. We are working to maximize our investment in these programs and the tools that we have to try to increase opportunities and encourage inmates to take full advantage of them.

For example, the Federal Prison Industries (FPI) program, funded by revenue generated by the wholly-owned government corporation, provides inmates the opportunity to gain marketable skills and a general work ethic—both of which can lead to viable sustained employment upon release. Though FPI experienced a significant decrease in inmates employed over the last five years, the Consolidated and Further Continuing Appropriations Act, 2012, will allow the Bureau of Prisons (BOP) to engage in interstate commerce of prison-produced goods, as state prisons have long done. Additionally Section 221 of the law authorizes FPI to begin pilot projects to produce items that are currently or would otherwise be produced outside of the United States. These new authorities will allow BOP to expand this important reentry program to reach and benefit more inmates.

Another state-modeled and evidence-based reentry program we have successfully implemented is the Residential Drug Abuse Treatment Program (RDAP). RDAP is an intensive 500-hour voluntary treatment program for inmates who have a moderate to serious substance abuse problem, which includes a community treatment component and has proven effective in reducing recidivism and relapse, by 16 percent and 15 percent, respectively. The FY 2013 President's Budget requests \$13 million to expand RDAP, providing a major opportunity to reduce recidivism, save taxpayer dollars and make communities safer.

For several years, BOP has had a good conduct time credits program similar to the successful Kansas state program, but we proposed its expansion, to increase potential good conduct time credits for federal inmates by 7 days for each year of the sentence imposed. In the long term, the proposal would increase institution safety, increase inmate reentry programming, and limit, somewhat, the growth in the inmate population, as each incoming cohort would have slightly (approximately 3.5%) reduced sentences to serve. We have also proposed allowing inmates to earn an incentive of up to 60 days per year of credit toward completion of their sentence for each year in which the inmate is in custody and successfully participates (for a minimum of 180 days) in programs that have been demonstrated to reduce recidivism. Absent changes of this nature, we anticipate a continued increase in the total number of prison-years served in BOP, resulting in increased costs to provide safe and secure incarceration and to protect public safety—key elements of the Department's mission.

STATE & LOCAL LAW ENFORCEMENT ASSISTANCE GRANTS

Question. DOJ has proposed a new program under the Juvenile Justice account called an “Evidence-based Competitive Demonstration Program.” What is this new program designed to accomplish?

Answer. The new Evidence-Based Competitive Demonstration Program will build on the successes of the existing formula and block grants programs and provide a mechanism to address those juvenile justice improvements that have progressed too slowly under the existing model. This program will provide grants on a competitive basis to states, tribes, localities, non-governmental organizations, not for profits, and universities willing to invest in evidence-based and innovative practices that will lead to comprehensive change and produce better outcomes. These grants will promote investments that take advantage of evidence-based strategies and practices, and promote innovation.

The program will provide grants on a competitive basis to the entities that demonstrate the highest achievement in key juvenile justice reforms and go beyond minimal compliance with basic mandates of the Juvenile Justice and Delinquency Prevention Act (JJDPa).

Question. Your budget proposes to zero-out the Juvenile Justice VOCA program, under which grants have been used to improve the investigation and prosecution of child abuse. Is the newly-proposed “Evidence-based Competitive Demonstration Program” intended to fund similar efforts?

Answer. No. As previously mentioned, the new Evidence-Based Competitive Demonstration Program will build on the successes of the existing formula and block grants programs and provide a mechanism to address those juvenile justice improvements that have progressed too slowly under the existing model. This program will provide grants on a competitive basis to states, tribes, localities, non-governmental organizations, not for profits, and universities willing to invest in evidence-based and innovative practices that will lead to comprehensive change and produce better outcomes. These grants will promote investments that take advantage of evidence-based strategies and practices, and promote innovation.

The program will provide grants on a competitive basis to the entities that demonstrate the highest achievement in key juvenile justice reforms and go beyond minimal compliance with basic mandates of the JJDPa.

The Department considers the activities supported by the VOCA/child abuse programs to be very important and the elimination of this funding was a difficult decision.

However, there are resources available to support such activities. For example, OJP intends to prioritize this type of training and technical assistance for state and local agencies and organizations to provide additional support for

judges and practitioners who work with abused and neglected children. OJP plans to use existing contracts that support a variety of training activities to deliver this assistance.

Question. Another new initiative—proposed to be carved-out of Second Chance Act/Prisoner Reentry funding—is known as “Pay for Success.” Would you explain how the Pay-for-Success program would work, and what the grant funds would pay for?

Answer. Pay for Success projects represent a new way to potentially achieve positive outcomes with the criminal justice population at a lower cost to governments. Under a typical Pay for Success model, service providers, either directly or through an intermediary organization, secure capital to fund their operations and achieve specified outcomes for a pre-defined target population. The funding organizations only recoup their investment at such time that the outcomes for the target population have been achieved and that achievement has been verified via an evaluation methodology mutually agreed upon by the government participant and the investors. This model is designed to be a low-cost, low-risk way for governments to achieve outcomes for certain populations. Under the proposal, BJA would fund state, local, or tribal reentry programs that proposed to incorporate a Pay for Success model with these funds. Second Chance grants would be used to fund operations if a state, local tribal or other organization will pay for outcomes after they are achieved; or pay for outcomes achieved within the grant period. Second Chance Act funds would be used as working capital to procure or reimburse for direct services, and not pay for returns on investment from other sources of working capital. All standard financial and administrative restrictions will apply. For example, grant funds will be unavailable to promote or fund separate financial instruments such as bonds.

Question. How was the \$4 million for domestic radicalization research used?

Answer. In FY 2012, \$4 million is appropriated for domestic radicalization research, which will be conducted by NIJ. Funding will be used to support the improved understanding of domestic radicalization to violent extremism, and to advance evidence-based strategies to effectively prevent and counter violent extremism. Results will be obtained through awards made via a competitive, peer-reviewed process. NIJ may also fund, if appropriate, interagency reimbursable agreements with other federal agencies, to leverage relevant investments or infrastructure of these agencies for criminal justice applications in this area.

NIJ has moved quickly to ascertain the state of knowledge in the field of domestic radicalization and to ensure it does not replicate projects already

underway in the United States. NIJ is coordinating its efforts with representatives from the Departments of Homeland Security, Defense, Justice, and United States Agency for International Development (USAID). As a result of these efforts, it is evident that state, local, and tribal communities require research and evaluation studies to help them better understand how to prevent and respond to instances of radicalization. To deliver this information, NIJ is focusing on two major efforts:

1. A research solicitation that focuses on domestic radicalization. This solicitation, which NIJ expects to release in April 2012, will solicit projects that address how domestic radicalization to violent extremism develops and the most productive roles criminal justice agencies can play in their communities in order to counter radicalization. Especially important in this regard is how radicalization leads to “lone wolf” violent extremists.
2. Conducting evaluations to identify evidence-based practices that are effective at preventing or addressing violent radicalization in our communities. Likely candidates for these evaluations are community-level intervention programs that include training programs for state, local and tribal law enforcement agencies.

FINANCIAL AND MORTGAGE FRAUD

Question. Your budget requests program increases totaling \$55 million to support 328 new positions—including 224 attorneys—to expand investigation and prosecution efforts in the areas of mortgage and investment fraud, contract fraud and consumer fraud. Would this large, seemingly permanent, expansion of DOJ’s investigating and litigating components supplant any state-level efforts to investigate and prosecute crimes and schemes of this nature?

Answer. These additional resources will enhance our efforts to combat mortgage and financial fraud at the federal level, and are not intended to supplant state-level enforcement. The Federal Government pursues criminal charges and brings affirmative civil cases when a substantial federal interest is served by doing so. Considerations for determining if a substantial federal interest would be served include, but are not limited to:

- Federal law enforcement priorities;
- The nature and seriousness of the offenses;
- The deterrent effects of prosecution;
- Culpability in connection with the offense;
- Whether there has been an impact on the Federal Treasury; and
- The probable sentence or other consequences if the person is convicted.

Based on these factors, much of the mortgage and financial fraud that occurs in this country is appropriately pursued by state and local authorities. There are instances, however, when a local jurisdiction will not pursue a case that involves suspects, victims, or evidence that may be located in numerous other jurisdictions, when an investigation or prosecution is beyond the resources or expertise of the particular office, or when the fraud involves a loss to a federal entity, such as the Federal Housing Administration. In these cases, there may be a substantial federal interest in stopping the fraud and punishing the perpetrator. Additionally, with the significant amount of mortgage and financial fraud that has occurred over the last several years, combined with the breadth and complexity we have seen in such cases, these additional federal positions are not sought, and are not expected, to supplant state and local efforts to combat fraud.

Question. DOJ has been operating a Financial Fraud Enforcement Task Force since 2010. What level of resources has DOJ been allocating to this task force annually? And why the need for such a large increase at this point in time?

Answer. With more than 20 federal agencies, 94 U.S. Attorneys' Offices and state and local partners, the Financial Fraud Enforcement Task Force is the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat fraud. The task force is improving efforts across the government and with state and local partners to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, recover proceeds for victims and address financial discrimination in the lending and financial markets. Additionally, the task force has established Financial Fraud Coordinators in every U.S. Attorney's Office around the country to help make these broad mandates a reality on the ground.

The Department requests program increases totaling \$55 million in FY 2013 for a variety of economic fraud enforcement efforts, including work being done by DOJ members of the President's Financial Fraud Enforcement Task Force. This increase will support additional FBI agents, criminal prosecutors, civil litigators, in-house investigators, forensic accountants, paralegals, and other support positions to ultimately improve the Department's capacity to investigate and prosecute allegations of financial and mortgage fraud. More importantly, this national initiative will pool state and federal resources to leverage impact.

To that end, the FY 2013 Budget requests a total program increase of \$55 million (including \$9.8 million for technology tools and automated litigation support) for this priority initiative. The request seeks 328 additional positions, including 40 FBI agents, 184 attorneys, 49 in-house investigators, 31 forensic

accountants, 16 paralegals, and 8 support staff. Of the total \$55 million program increase, \$37.4 million is to increase criminal enforcement efforts and \$17.6 million is to increase civil enforcement efforts.

The additional resources will support the Department's investigation and prosecution of the broad range of crimes that fall under the definition of financial fraud, including securities and commodities fraud, investment scams, and mortgage foreclosure schemes. The additional resources will build upon the successes of the Financial Fraud Enforcement Task Force that, since its inception in FY 2010, has facilitated increased investigations and prosecutions of financial fraud relating to the financial crisis and economic recovery efforts. While it is not possible to directly measure the direct resources allocated to the Financial Fraud Enforcement Task Force because of its expansive and co-operative arrangements spanning many different agencies, with the requested program increase, DOJ plans to dedicate over \$700 million to combating white collar, mortgage and financial fraud, and other economic crimes in FY 2013. As cases and white collar crime schemes become increasingly complex and sophisticated, it will help to have additional resources to address the complexity and increasing number of cases referred from our partner agencies and the task force members.

CAMPUS SAFETY

Question. As you may know, in light of the terrible 2007 attack at Virginia Tech, some of my colleagues from Virginia—Rep. Bobby Scott and Sen. Mark Warner—introduced legislation to create a national clearinghouse for campus safety at the Department of Justice. They believe that the clearinghouse could help develop best practices for campus safety and better disseminate information to colleges and universities. Does the department currently have a campus safety program or initiative, similar to the one prescribed in their legislation? Does any other federal agency currently address campus safety training?

Answer. The Department does not currently have a program or initiative similar to that described in the bill, but the COPS Office has pursued initiatives to help the approximately 4,400 Institutions of Higher Education throughout the United States implement community policing and promote public safety. There are over 20,000 campus police and security officers, but there is no national model for providing safety on college campuses.

Under OJP, the Bureau of Justice Assistance (BJA) is currently supporting the following campus safety training activities:

- In December, 2011, BJA, in cooperation with the U.S. Department of Homeland Security and the FBI Office of Law Enforcement Coordination,

convened a Campus Security Roundtable to discuss campus planning efforts related to large events. Representatives from schools in the major sports conferences (Big 10, Big 12, SEC, and ACC) met in Orlando, Florida, to share information on how they plan for major events on campus and the steps they take to prepare for everything from major weather events to possible terrorist attacks that might occur in stadiums and sporting arenas.

- In 2010, BJA funded Margolis, Healy & Associates, LLC (MH&A) to identify, evaluate, refine, and replicate specific evidence-based approaches to crime prevention at institutions of higher education. Crime prevention program templates will be produced, and technology-based delivery strategies identified. A web-based technical assistance center will be established to serve as a dissemination point for the templates and social-networking resource for those seeking further information and assistance on crime prevention strategies. This initiative involves collaboration with the International Association of Campus Law Enforcement Administrators (IACLEA); the International Association of Chiefs of Police (IACP)—University and College Police Section; and the FBI Office of Law Enforcement Coordination.
- In 2010, BJA provided funding to Johns Hopkins University to create a campus public safety officer certification program. At present, there is no nationally-recognized certification program that meets the unique needs and culture of these campus public safety personnel. While agency-centered accreditation programs exist, there are none that certify individuals serving the field. The intent of certification is to provide campus police and security personnel with a common understanding and application of the knowledge, skills and abilities to effectively prevent crime and disorder, protect people and infrastructure, and foster and sustain quality of life in the campus environment. This initiative involves collaboration with IACLEA; IACP—University and College Police Section; the International Association of Emergency Managers—Universities and Colleges Caucus; and the FBI Office of Law Enforcement Coordination.
- Previous campus safety projects funded by BJA also include funding for the National Crime Prevention Council to develop and pilot a Basic Crime Campus Crime Prevention Course and an Advanced Campus Crime Prevention Course. BJA has also provided funding to Major Cities Chiefs to create Campus Security Guidelines, which provided sample MOUs and other information to better facilitate cooperation between campus public safety and municipal law enforcement. Finally, BJA provided funding to IACP for a Citizen Involvement in Campus and School Safety, which created training and outreach materials to

incorporate community volunteers' efforts in college and university law enforcement.

The Office on Violence Against Women's Campus Grant Program is designed to encourage institutions of higher education to adopt comprehensive, coordinated responses to domestic violence, dating violence, sexual assault, and stalking. The Campus Program strengthens on-campus victim services and advocacy, security, and investigative strategies to prevent and prosecute violent crimes against women on campuses.

Other federal agencies involved in campus safety initiatives are the Office of Community Oriented Policing Services (COPS) and the U.S. Department of Education, who funds the Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention. The Center serves primarily as a clearinghouse focused on alcohol and drug abuse on college campuses.

The above established collaborative partnerships serve as the foundation to the creation of a more formal Campus Public Safety Consortium that could produce similar outcomes as a national clearinghouse.

Question. Does the department support this legislation?

Answer. The Department acknowledges that the development and dissemination of best practices could benefit the safety of students, faculty, campus employees, and campus law enforcement officers, and would be happy to discuss further.

HONOR KILLINGS

Question. Victims of honor violence are targeted because of behavior deemed by their family or community to be shameful. Honor violence can take many forms, including verbal abuse, threats, stalking, harassment, false imprisonment, physical violence, and homicide. It is my understanding that no law enforcement agency in the United States currently tracks cases of honor violence and honor murders; therefore, it is impossible to know how frequently this form of violence against women occurs in this country. Do you think it would be beneficial to establish guidelines for the collection of such data for research and statistical purposes?

Answer. The Department agrees that crimes against women described as "honor violence" are horrific in nature and ought to be studied. However, the recent public recognition of the topic of honor violence and the scarcity of cases reported to the police suggest significant difficulties in data collection on this topic. The development of guidelines at this stage is premature—the Department welcomes the opportunity to work with you to determine the

specific research, statistics, and programmatic needs for the criminal justice community regarding honor violence.

QUESTIONS FOR THE RECORD—MR. ADERHOLT

METH CLEAN-UP FUNDING

Question. One of the most significant dangers to the communities I represent is the scourge of methamphetamine. Not only is its abuse a source of destruction and heartbreak, but its manufacturing process leaves serious environmental hazards for communities all across America. Meth is not like other drugs. Its lack of any natural process and its ability to chemically alter a person's brain make it extremely deadly.

I was pleased to see continued funding for the Meth Clean-Up account requested in the FY13 budget request.

First, I would like to specifically thank your Department; especially the folks in the DEA, for helping Alabama get its Container Program up and running again and for the assistance in obtaining more Containers to make them more accessible in the meth-heavy areas of our State.

Answer. The Department takes pride in the partnerships with Alabama and other state and local agencies in expanding the container program. Thus far, DEA estimates states with deployable containers realize a significant cost savings of approximately \$1,910 per lab. Container cleanups cost \$320 per cleanup, on average, while hazardous waste contractors cost \$2,230 per cleanup, on average.

Question. What is your agency doing to help promote and replicate the Container Program to additional states? This is the type of innovative work that can help save money in the future, both for state, local and federal law enforcement.

Answer. Currently, eight states have operational container programs (Arkansas, Kentucky, Tennessee, Oklahoma, Nebraska, Illinois, Indiana and Alabama), and DEA is working with five other states (Michigan, Mississippi, North Carolina, Ohio, and Virginia) to implement the container program in their state during FY 2012. DEA expects these additional five states to have operational container programs in FY 2013. DEA has also contacted an additional eight states for potential container program expansion. Beyond this cohort of 21 states, DEA does not currently anticipate expanding the container program because the remaining states have lower cleanup requirements. For those states without container programs, DEA assesses whether or not the program is a cost effective option. If the state has only limited cleanups, the upfront equipment and training costs can exceed potential container program savings.

In these cases, DEA will provide cleanup services through its hazardous waste contractors.

CHILD ADVOCACY CENTERS

It appears that the department has not included funding under the Victims of Child Abuse Act. This line has been in the budget since 1994 and has resulted in the development of more than 750 children's advocacy centers, 50 state chapters, the National Children's Alliance and the four Regional Children's Advocacy Centers, among other programs that serve child victims of abuse. In 2011, more than 269,000 children have been served by the children's advocacy centers.

Question. Given that these evidence-supported, cost effective programs have been continuously cited in the Department's Model Program Guide and annual budget requests, what is the administration's plan for continuing these valuable services?

Answer. The Department considers the activities supported by the Victims of Child Abuse Act (VOCA)/child abuse programs to be important and the elimination of this funding was a difficult decision. However, there are still resources available to support these activities. For example, OJP intends to prioritize this type of training and technical assistance for state and local agencies and organizations to provide additional support for judges and practitioners who work with abused and neglected children. OJP plans to use existing contracts that support a variety of training activities to deliver this assistance.

Question. What is the rationale behind eliminating support for the Victims of Child Abuse Act when it is improving our response to child abuse, reducing the prevalence of child sexual abuse, and resulting in such dramatic cost savings?

Answer. This request reflects the commitment to cutting the deficit and restoring fiscal sustainability. This is a significant challenge, and it required the Administration to make difficult funding decisions, including redirecting resources from some existing programs to address the most urgent national priorities. However, there are still resources available to support these activities. For example, OJP intends to prioritize this type of training and technical assistance for state and local agencies and organizations to provide additional support for judges and practitioners who work with abused and neglected children. OJP plans to use existing contracts that support a variety of training activities to deliver this assistance.

Question. Why does the Administration want to invest in new demonstration projects that may work when we have proven methods that are working, and are slated to be eliminated?

Answer. As just mentioned, this request reflects the commitment to cutting the deficit and restoring fiscal sustainability. This is a significant challenge, and it required the Administration to make difficult funding decisions, including redirecting resources from some existing programs to address the most urgent national priorities. Although funding is eliminated for VOCA, OJP plans to prioritize technical assistance and training, where possible, to meet this need.

The new Evidence-Based Competitive Demonstration Program will build on the successes of the existing formula and block grants programs and provide a mechanism to address those juvenile justice improvements that have progressed too slowly under the existing model. This program will provide grants on a competitive basis to states, tribes, localities, non-governmental organizations, not for profits, and universities willing to invest in evidence-based and innovative practices that will lead to comprehensive change and produce better outcomes. These grants will promote investments that take advantage of evidence-based strategies and practices, and promote innovation.

The program will provide grants on a competitive basis to the entities that demonstrate the highest achievement in key juvenile justice reforms and go beyond minimal compliance with basic mandates of the Juvenile Justice and Delinquency Prevention Act.

TEDAC

Question. Mr. Holder, I understand that the FBI's Terrorist Explosive Device Analytical Center, or TEDAC, has been expeditiously attempting to forensically exploit the backlogged IEDs coming in from Iraq and Afghanistan. I, along with several of my colleagues on this panel, applaud the FBI's efforts in this arena, and encourage them to do everything possible to expedite this process. I am also pleased to hear that construction of the TEDAC facility begins soon.

Should there be any remaining funding left after construction efforts are concluded, can you assure this Committee that you will fight to ensure those balances are dedicated to the next phase of the TEDAC construction, rather than proposed for rescission or redirected to another DOJ effort?

Answer. The current plan fully obligates all available TEDAC funding for the construction and outfitting of the new facility. The disposition of any remaining funding has not been determined.

IMMIGRATION

Question. Why are you pursuing lawsuits against states that have passed pro-immigration enforcement laws when no similar actions are being taken against jurisdictions that ignore Federal detainees and free dangerous individuals into society?

Answer. The Department takes very seriously the prospect of challenging any type of state enactment and evaluates such matters on a case-by-case basis. In deciding to file the federal preemption challenges to various state immigration laws, the Department has not limited its review to “pro-immigration enforcement laws,” but instead has evaluated whether the state law conflicts with or otherwise would stand as an obstacle to federal immigration laws. Indeed, in seeking to enjoin certain provisions of Utah’s immigration statute, the Department made clear in its court filings that it also viewed Utah’s immigration guest worker statutes—which would purport to provide work permits to unlawfully present aliens—as preempted by federal law, and that if the state did not take steps to comply with federal law in its future legislative sessions, the Department would not hesitate to take legal action against these provisions as well, before those laws were to go into effect. States may take steps to assist the federal government in its enforcement of the immigration laws; however, when a state chooses to engage in such efforts, it may not act in a manner that is not cooperative with the federal government—whether its efforts are viewed as pro-immigration or anti-immigration enforcement—as such conduct would be contrary to federal law. The federal government will continue to apply these same principles of preemption in evaluating state immigration laws, including any laws on detainees or other issues.

Question. How much money are you requesting in this budget to proceed with lawsuits against Alabama and Arizona based on their pro-immigration enforcement laws?

Answer. The Civil Division is litigating these cases. However, the Division does not budget by funding requirements for specific lawsuits.

HHS MANDATES

Question. On August 1, 2011, HRSA issued guidelines mandating that all insurance plans cover, without cost-sharing, all of the services recommended by the IOM. This mandate includes “All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” Were you or your offices consulted regarding either the constitutionality of this mandate or whether it would violate the Religious Freedom Restoration Act? If so, please indicate

when you were consulted. Did you provide advice regarding whether the mandate, if enforced against a religious objector, would violate the First Amendment and/or the Religious Freedom Restoration Act? If so, please summarize the analysis provided, and to whom it was provided.

Answer. The regulations referred to in this question are being challenged in at least 8 lawsuits in federal district courts across the country. These lawsuits raise a number of claims, including that the regulations violate the First Amendment and the Religious Freedom Restoration Act. The Department of Justice is representing the Department of Health and Human Services, Secretary Kathleen Sebelius, the Department of Labor, Secretary Hilda Solis, the Department of the Treasury, and Secretary Timothy F. Geithner in these lawsuits. The Department of Justice was first consulted in late July 2011. The Department of Justice was consulted again on November 15, 2011, and such consultation is ongoing. Any information on the substance of consultations between the Department of Justice and other Executive Branch agencies regarding the ongoing litigation and/or the lawfulness of the regulations is privileged and protected from disclosure by, among other things, the deliberative process privilege, the attorney-client privilege, and the work product doctrine.

Question. On August 1, 2011 HHS issues an interim final rule, creating an exceedingly narrow exemption for religious employers. This narrow exemption was finalized without change on February 10, 2012. Were you or your office consulted regarding either the constitutionality of this exemption or whether it would violate the Religious Freedom Restoration Act? If so, please indicate when you were consulted. Did you provide advice regarding whether the exemption, if found to be too narrow to protect all religious objectors, would violate the First Amendment and/or the Religious Freedom Restoration Act? If so, please summarize the analysis provided, and to whom it was provided.

Answer. As noted above, the interim final rule, and related regulations, is the subject of litigation currently pending in several federal district courts. The Department of Justice was first consulted in late July 2011. The Department of Justice was consulted again on November 15, 2011, and such consultation is ongoing. Any information on the substance of consultations between the Department of Justice and other Executive Branch agencies regarding the ongoing litigation and/or the lawfulness of the regulations is privileged and protected from disclosure by, among other things, the deliberative process privilege, the attorney-client privilege, and the work product doctrine.

QUESTIONS FOR THE RECORD—MR. BONNER

CHILD ADVOCACY CENTERS

The Victims of Child Abuse Act was initially enacted in the early 1990s to help develop and support Children's Advocacy Centers throughout the United States. During the past twenty years we have seen these programs develop throughout the United States, and the use of these programs has become the standard of care for children who have experienced sexual abuse. At this time there are more than 800 Children's Advocacy Centers which provided services to more than 270,000 children in 2011 alone. The Department of Justice has invested in evaluation research on the impact of this CAC model, and the findings have been consistent—improved services for children while eliminating duplication of services. This public-private partnership is working, and child abuse rates are actually declining since the advent of these programs. The Victims of Child Abuse funding supports Training and Technical Assistance for Child Abuse Professionals throughout the United States so they can intervene effectively in these cases, supports a national membership organization to assure a standard of care is provided within all CACs, and also provides limited financial support for these CACs throughout the United States. These programs are helping our children recover from abuse, reducing the prevalence of abuse, and through their coordinated multidisciplinary services reducing the cost of intervention an average of approximately \$1,000 per case. Given the number of cases seen last year alone, that is a savings of approximately \$270,000,000! Based on these facts, I have a couple questions:

Question. What is the rationale behind eliminating support for the Victims of Child Abuse Act when it is improving our response to child sexual abuse, reducing the prevalence of child sexual abuse, and resulting in such dramatic cost savings?

Answer. This request reflects the commitment to cutting the deficit and restoring fiscal sustainability. This is a significant challenge, and it required the Administration to make difficult funding decisions, including redirecting resources from some existing programs to address the most urgent national priorities. However, there are still resources available to support these activities. For example, OJP intends to prioritize this type of training and technical assistance for state and local agencies and organizations to provide additional support for judges and practitioners who work with abused and neglected children. OJP plans to use existing contracts that support a variety of training activities to deliver this assistance.

Question. Why does the Administration want to invest in new demonstration projects (there is a brand new evidence based grant program in this space that the Administration funded at \$22.5 million) that may work when we have proven methods that are working, and these are slated to be eliminated?

Answer. This request reflects the commitment to cutting the deficit and restoring fiscal sustainability. This is a significant challenge, and it required the Administration to make difficult funding decisions, including redirecting resources from some existing programs to address the most urgent national priorities. Although funding is eliminated for VOCA, OJP plans to prioritize technical assistance and training to meet this need.

The new Evidence-Based Competitive Demonstration Program will build on the successes of the existing formula and block grants programs and provide a mechanism to address those juvenile justice improvements that have progressed too slowly under the existing model. This program will provide grants on a competitive basis to states, tribes, localities, non-governmental organizations, not for profits, and universities willing to invest in evidence-based and innovative practices that will lead to comprehensive change and produce better outcomes. These grants will promote investments that take advantage of evidence-based strategies and practices, and promote innovation.

The program will provide grants on a competitive basis to the entities that demonstrate the highest achievement in key juvenile justice reforms and go beyond minimal compliance with basic mandates of the Juvenile Justice and Delinquency Prevention Act.

Question. Given that these evidence-supported, cost effective programs have been continuously cited in the Department's Model Program Guide and annual budget requests, what is the administration's plan for continuing these valuable programs?

Answer. The Department considers the activities supported by the VOCA and child abuse programs to be important and the elimination of this funding was a difficult decision. However, there are resources available to support such activities. For example, OJP intends to prioritize this type of training and technical assistance for state and local agencies and organizations to provide additional support for judges and practitioners who work with abused and neglected children. OJP plans to use existing contracts that support a variety of training activities to deliver this assistance.

QUESTIONS FOR THE RECORD—MR. YODER

SECOND AMENDMENT

Question. The administration proposes to eliminate a provision that prohibits the use of funds to ban the importation of “non-sporting” shotguns. It is my understanding that this was in response to a study on the subject that was released last spring. What was the status of implementing that study’s proposal before this amendment was enacted?

Answer. The intent of the Study on the Importability of Shotguns (Report) was to publish clear and objective criteria for the sporting purposes test for shotguns. On January 18, 2011, ATF fully implemented the criteria presented in the Report to determine whether or not a shotgun may be imported into United States commerce. ATF has continued to apply the criteria presented in the Report. ATF is in compliance with the amendment as enacted in April 2011. In response to concerns expressed by the regulated firearms industry following the release of the report, ATF held a comment period, during which it received over 12,000 comments. ATF is analyzing those comments to determine whether revisions to the criteria should be made. ATF plans to complete this process and publish any amendments to the report prior to the end of FY 2012.

Question. The administration proposes to delete a provision that prohibits expenditure of funds for denying import applications for “curio or relic” firearms of U.S. origin. The Department says this provision “limits the President’s discretion in administering foreign policy.” Since this provision was enacted in 2005, hasn’t the Justice Department regularly advised the State Department to deny retransfer requests for such firearms, resulting in these firearms not being imported anyway?

Answer. ATF evaluates re-transfer requests for curio or relic firearms of U.S. origin on a case-by-case basis and has not regularly recommended denial. Rather, ATF’s recommendations to the Department of State are based on an assessment of the public safety impact and diversion risks posed by each model firearm sought for importation. ATF considers the unique physical attributes, design, and function of a firearm in reaching its recommendation. For example, firearms which are relatively heavy, difficult to conceal, not easily converted to fully-automatic fire, and not available at prices that would make them a weapon of choice for traffickers have received ATF’s support for importation. Recent examples of firearms recommended by ATF for re-transfer approval include the Springfield, model 1898 Krag-Jorgensen, .30-.40 caliber, bolt-action carbine rifle; the M1903, 30.06 caliber, bolt action Springfield rifle; and the M-1 Garand, .30 caliber, semi-automatic rifle.

It is also important to note that commercial import by private U.S. importers is not the sole means of legal entry for U.S. origin curio or relic firearms. The Department of Defense has the authority to acquire curio or relic U.S. origin firearms for domestic distribution through the Civilian Marksmanship Program and has expressed its interest in exercising this authority should qualifying firearms become available abroad.

HUMAN TRAFFICKING

Last year, several Committee Members asked a number of questions related to efforts to prevent domestic human trafficking and the exploitation of children. Some of the discussion centered around efforts of coordinating U.S. Attorney Task Forces to work on this issue.

Question. How are the task forces working?

Answer. Approximately two-thirds of the U.S. Attorneys' Offices are participating in task forces that address human trafficking. Many of these task forces were developed based on the Department's Human Trafficking Enhanced Enforcement Initiative that was launched by the Attorney General in January 2011, including six pilot interagency Anti-Trafficking Coordination Teams (ACTeams) designed to streamline coordination among federal investigative agencies and federal prosecutors. There are currently approximately 28 task forces receiving funding in one form or another from the Office of Justice Programs.

These current task forces include those that are purely operational with "on the ground" law enforcement personnel and prosecutors. They also include task forces made of federal, state and local leaders focusing on regional coordination and information sharing, as well as task forces primarily addressing trafficking victims' unique needs. Membership generally includes federal law enforcement partners, state and local law enforcement, and various other governmental and non-governmental organizations, including those providing victim services.

Question. How effective are they?

Answer. Most of the United States Attorneys' Offices (USAOs) employ a full spectrum approach in their task force participation. In addition to the United States Attorney, participants from the USAOs may include prosecutors, law enforcement coordinators, and victim assistance personnel. In addition to their task force participation, USAO prosecutors and staff are engaged in their regular duties investigating and prosecuting human trafficking cases that are brought in federal court. Statistics suggest that the task forces are

having a positive impact on anti-trafficking efforts. For example, from FY 2009 to FY 2011, the number of human trafficking cases filed increased 50%. While we do not have statistics showing that this increase is a direct result of the work of the task forces, it is a logical assumption that the increased coordination and information sharing of the task forces is at least partially responsible for the rise in cases.

Question. Is there any resistance to the idea of having it being USAO led if not funded by fed?

Answer. Due to varying local needs, relationships, and dynamics, the task forces on which the U.S. Attorneys' Offices are currently participating are led or co-led by a variety of federal, state, tribal, or local partners, with approximately half of the task forces being led by the United States Attorneys' Offices. Because many effective task forces are currently led by state or local agencies, instituting a United States Attorney-led task force in those districts may be redundant or disruptive to current success. Those task forces that are funded by grants from the Department's Office of Justice Programs are all led by non-federal entities that closely collaborate with the U.S. Attorneys' Offices. Some task forces do not receive funding from any source, federal or otherwise.

Question. How can we ensure participation by victim's service providers and by law enforcement?

Answer. The Department is using several measures to promote participation by victim service providers and law enforcement. First, the Office of Justice Programs collaborates between these two groups as a condition of receiving federal funding. Additionally, the Bureau of Justice Assistance and the Office for Victims of Crime collaborated on an Anti-Trafficking Task Force Strategy and Operations e-Guide, which promotes the advantages of victim service providers and law enforcement working together in forming and operating anti-trafficking task forces. United States Attorneys' Offices are also encouraged to engage victim assistance personnel to ensure sustainable victim-centered practices, as well as to assist with capacity-building and continuity for a sustained effort. Victim assistance personnel are valuable members of the task forces, and draw upon their knowledge of victim issues and statutory mandates, as well as their existing coordination with other law enforcement personnel and agencies.

Question. It is my understanding that the criminal division held 29 human trafficking outreach and training programs. Does the Department have the

necessary resources to training prosecutors, state, and local officials to meet the workload through the country?

Answer. The Criminal Section of the Department's Civil Rights Division and the Division's Human Trafficking Prosecution Unit (HTPU), in collaboration with U.S. Attorneys' Offices (USAOs) nationwide, have principal responsibility for prosecuting human trafficking crimes, except for cases involving sex trafficking of minors, which the Criminal Division's Child Exploitation and Obscenity Section addresses along with the USAOs. In addition to prosecuting significant human trafficking cases, HTPU conducts training, technical assistance, and outreach initiatives to federal, state, local, and international law enforcement partners and victim assistance NGOs.

As part of its work, HTPU provides training to law enforcement partners and first responders throughout the country. Such training is critical because human trafficking is a hidden crime, and efforts to combat it depend on the ability of first responders and law enforcement officers to recognize its signs and rescue and stabilize victims. The Budget does seek additional funding for the Division in FY 2013, which would be used in part to strengthen our work to combat human trafficking including providing training for prosecutors and other state and local officials to meet national anti-trafficking demands.

Question. It is my understanding that The Department, in collaboration with the Departments of Homeland Security and Labor was planning to launch Anti-Trafficking Coordination Teams (ACTeams) in select pilot districts nationwide during 2011 to respond to identified human trafficking threats with a coordinated, pro-active, interagency Federal law enforcement strategy. Did this occur, and if so, can you please provide the Committee with a breakdown of the results.

Answer. The Departments of Justice, Homeland Security, and Labor implemented the Human Trafficking Enhanced Enforcement Initiative in 2011. As part of this initiative, we conducted a rigorous, competitive interagency selection process that culminated in the selection and launch in July 2011 of six Phase I Pilot Anti-Trafficking Coordination Teams (ACTeams) in select districts around the country. These six ACTeams are now fully operational, developing high-impact human trafficking investigations and prosecutions as a result of the enhanced strategic coordination among federal investigative agencies and federal prosecutors. The six Phase I Pilot ACTeams are based in El Paso, Texas; Memphis, Tennessee; Atlanta, Georgia; Miami, Florida; Kansas City, Missouri; and Los Angeles, California. In their first months of operation, they have initiated significant inter-agency investigations into multi-district and multi-national human trafficking offenses involving both forced labor and sex trafficking.

INTERNET CRIMES AGAINST CHILDREN TASK FORCE

Question. In fiscal year (FY) 2011, the ICAC program trained over 31,000 law enforcement personnel, over 2,800 prosecutors, and more than 11,000 other professional working in the ICAC field. In FY 2011, ICAC investigations led to more than 5,700 arrests and over 45,000 forensic examinations, with nearly 40 percent of those arrests (2,248) resulting in the acceptance of a plea agreement by the defendant in lieu of trial. Since the program's inception in 1998, the ICAC task forces have reviewed more than 277,000 complaints of alleged child sexual victimization resulting in the arrest of more than 29,000 individuals. Given that protecting our children and getting predators off the street is a priority, what percentage of these cases are related to child pornography and how much of this is enticement?

Answer. Since the inception of the ICAC Program in 1998, 71 percent of the complaints reviewed were specific to child pornography and 15 percent were specific to enticement. Following is a breakout of the more than 277,000 complaints reviewed by case type:

Table 1: ICAC cases by type

Traveler	16,959
Enticement	42,357
Obscenity Directed to Minors	17,150
Child Prostitution	3,114
Child Pornography	198,280
TOTAL	277,860

VICTIMS OF CHILD ABUSE

Question. It appears that the department has not included funding under the Victims of Child Abuse Act. This line has been in the budget since 1994 and has resulted in the development of more than 750 children's advocacy centers, 50 state chapters, the National Children's Alliance and the four Regional Children's Advocacy Centers, among other programs that serve child victims of abuse. In 2011, more than 269,000 children have been served by the children's advocacy centers. What is the administration's plan for continuing these valuable services?

Answer. The Department considers the activities supported by the Victims of Child Abuse Act to be important and the elimination of this funding was a difficult decision. However, there are resources available to support such

activities. For example, OJP intends to prioritize this type of training and technical assistance for state and local agencies and organizations to provide additional support for judges and practitioners who work with abused and neglected children. OJP plans to use existing contracts that support a variety of training activities to deliver this assistance.

VETERANS DRUG COURTS

Question. The FY 2013 Budget justification recommends consolidation of the drug court and mental health court grant programs into a single Problem Solving Justice grant program. The justification states, “Under this initiative, grant funding will be available to state, local and tribal criminal justice agencies to support: drug courts, mental health courts, and development and implementation of problem solving courts strategies to address unique local concerns.” Would Veterans Treatment Courts qualify for funding under this new consolidated grant program?

Answer. Yes, BJA would continue to support veterans treatment courts under the proposed consolidated Problem Solving Justice Initiative.

Question. According to the Rand Corporation, one in five veterans returning from Iraq and Afghanistan will experience a stress related mental illness and many others fall victim to drug and alcohol dependence. Many of these problems can land our veterans in trouble with the law and lost in our criminal justice system.¹ Given the increasing number of troops returning from the wars in Iraq and Afghanistan, do you believe it is a smart idea to invest in Veterans Treatment Courts?

Answer. The Department certainly agrees in investing and building capacity for veterans treatment courts. The Department has partnered with the National Drug Court Institute, the Substance Abuse and Mental Health Services Administration, and the Department of Veterans Affairs to develop and pilot a training curriculum for jurisdictions wanting to implement veterans treatment courts, and has expanded the delivery of these trainings so that 20 additional teams will be trained in FY 2012.

Question. In her July 2011 testimony before the Senate Judiciary Committee, Denise O’Donnell, Director for the Bureau of Justice Assistance (BJA) Office of Justice Programs, stated that “BJA is helping to expand Veterans Treatment

¹Adamson, David M., M. Audrey Burnam, Rachel M. Burns, et. al., *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* (Santa Monica, CA: RAND Corporation, 2008) <http://www.rand.org/pubs/monographs/MG720>.

Courts”² Can you elaborate on how the Department of Justice is involved in helping to expand this specific type of problem solving court?

Answer. As previously stated, BJA has partnered with the National Drug Court Institute, the Substance Abuse and Mental Health Services Administration, and the Department of Veterans Affairs to develop and pilot a training curriculum for jurisdictions wanting to implement veterans treatment courts, and has expanded the delivery of these trainings so that 20 additional teams will be trained in FY 2012.

Question. Does the Department of Justice plan to support Veterans Treatment Courts in the same manner that they support Drug Courts and Mental Health Courts—by prioritizing grant funding for state and local governments to establish these problem solving courts?

Answer. Veterans Treatment Courts would be eligible for funding under the new consolidated initiative. Part of the purpose for the proposed consolidated initiative is to allow local jurisdictions the flexibility to prioritize their own needs within their funding requests.

QUESTIONS FOR THE RECORD—MR. SCHIFF

DNA

Question. I have concerns regarding the past administration of Debbie Smith Act grants that Congress appropriated for the purpose of addressing the problem of backlogs in DNA evidence, particularly sexual assault kits, in State and Local crime labs around the country.

Over the years, there has been a real disconnect between Congress and the Office of Justice Programs about how to spend some of that DNA money. I’m concerned that much of that funding over the years has been spent on programs that are at best ancillary to the purposes of the grant.

I’m not the only one who feels that way. The Senate Appropriations Committee included language in the FY12 CJS committee report stating that “The Committee’s patience has been exhausted” and “Too often, to the Committee’s dismay, NIJ appears to fritter away forensic and DNA analysis funding by broadly dispersing grants to agencies and entities of dubious merit.” I share those sentiments.

Turning to the Department’s FY13 request, the Department proposes raising the cap on the Victims of Crime Fund in part to pay for funding for

²Senate Committee on the Judiciary, *Drug and Veterans Treatment Courts: Seeking Cost-effective Solutions for Protecting Public Safety and Reducing Recidivism*, testimony of Denise O’Donnell, 112th Cong., 1st sess., July 19, 2011 http://www.ojp.usdoj.gov/newsroom/testimony/2011/11_0719odonnell.pdf.

DNA. I want to highlight to you that your budget singles out DNA as a worthy purpose area under the VCF's mandate to support victim's services. And I agree with that. But that logic only applies if we're actually using DNA funding to get justice for past and future victims of sexual assault and other violent crimes.

How does the Department intend to respond to concerns from Congress regarding the administration of DNA grants in prior years?

Answer. The National Institute of Justice (NIJ) takes its responsibility for administering all of its DNA and other forensics funds very seriously and is strongly committed to reducing the nation's backlog of DNA and other forensic evidence in state and local crime laboratories. NIJ's principal forensics-related appropriations in recent years have been "for DNA-related and forensic programs and activities," of which³—

- (A) \$151,000,000 is for a DNA analysis and capacity enhancement program and for other local, State, and Federal forensic activities including the purposes of section 2 of the DNA Analysis Backlog Elimination Act of 2000 (the Debbie Smith DNA Backlog Grant Program);
- (B) \$5,000,000 is for the purposes described in the Kirk Bloodsworth Post-Conviction DNA Testing Program (Public Law 108-405, section 412); and
- (C) \$5,000,000 is for Sexual Assault Forensic Exam Program Grants as authorized by Public Law 108-405, section 304[.]

In compliance with these authorities, NIJ has applied substantial funding of the DNA and other forensics for grants to state and local crime laboratories for DNA analysis (including DNA analysis for sexual assault cases) and capacity enhancement activities intended to address current DNA evidence backlogs (including backlogs of DNA evidence from sexual assault cases), and to prevent new DNA backlogs from occurring.

For example, in FYs 2010 and 2011, NIJ awarded over 70 percent of its appropriations carve-out "for a DNA analysis and capacity program and for other local, State, and Federal forensic activities" via grants to state and local governments under the DNA Backlog Reduction Program. (See <https://ncjrs.gov/pdffiles1/nij/s1000948.pdf> to review the FY 2011 DNA Backlog Reduction Program solicitation and <http://www.dna.gov/funding/dna-backlog-reduction/funding> for a list of FY 2011 awards.) Pursuant to the FY 2012 appropriation, which contains language and authority

³It is important to stress here that the appropriations in these years variously were subject to rescission and reprogramming actions, which reduced the amounts actually available for programmatic obligations. Funding listed in the second paragraph describes FY 2010 funding.

virtually identical to last year's, NIJ again expects to allocate over 70 percent of the same carve-out to support the DNA Backlog Reduction Program.

The impact over the past several years of NIJ's investments in support of state and local forensic DNA analysis activities is clear. NIJ has been studying forensic DNA evidence backlogs, forensic DNA analysis demand, and public crime laboratory capacity trends, and there is no doubt that there has been a substantially positive impact in addressing current and preventing future DNA evidence backlogs. NIJ's program investments have resulted in:

- A total of 215,609 forensic DNA cases analyzed between January 2005 and July 2011, and 109,913 forensic case profiles uploaded between FY 2005 and FY 2010 to the Combined DNA Index System (CODIS), which is FBI's software program that operates databases of DNA profiles; and
- The analysis of over 1.8 million convicted offender and arrestee DNA database samples, resulting in 22,871 CODIS hits from calendar years 2005 to 2011.

Contrary to the suggestion that NIJ's other forensic program activities have "wasted" or "fritter[ed] away forensic and DNA analysis funding by broadly dispersing grants to agencies and entities of dubious merit," NIJ has engaged in a deliberate, focused approach, to complement its state and local forensics grant programs with research, development, evaluation, training, and technical assistance activities specifically designed to increase state and local access to technologies, techniques, and information to enhance forensic capacity, including DNA forensic analysis capacity. Without these complementary activities, state and local governments could not hope to keep pace with an ever-increasing demand for forensic DNA analysis services, address existing DNA backlogs, and prevent new DNA backlogs from occurring.

Funding only DNA Backlog Reduction Program grants will not solve the complex DNA backlog problem. In fact, it would be irresponsible for NIJ not to invest in other critical areas to address issues that contribute to this problem. To address these other critical areas, NIJ has developed a holistic approach that incorporates DNA capacity building for crime labs, DNA testing and analysis, cutting edge DNA research and development, rigorous training and education for forensic DNA analysts, and "cold case" funding assistance that helps state and local governments use DNA to help solve violent crime cold cases. The "Solving Cold Cases with DNA" program has been responsible for solving numerous cases across the United States, bringing justice to victims who thought their cases had long been forgotten and catching criminals that continued to offend. (For more information on the FY 2011 program, see <https://www.ncjrs.gov/pdffiles1/nij/sl000954.pdf>.)

For example, the training and education that NIJ supports with its funding investments develops and boosts the skills of forensics professionals working in our nation's public crime laboratories, so they are better prepared to handle

the constant influx of cases. Direct funding assistance to state and local governments has much less impact and cannot be leveraged to full effect without a corresponding commitment to training and educating new and existing forensic analysts. State and local governments have limited training dollars available for their forensic DNA analysts; these technical trainings funded with these NIJ funds are offered free of charge and provide a necessary and welcome resource.

Question. Does the Department agree with the Senate Committee's FY12 report language regarding past DNA spending, alleging that much has been wasted on projects unrelated to reducing DNA backlogs?

Answer. The Department respectfully disagrees with this language, as it has administered its forensics funds in compliance with the authorities for these appropriations, as described above.

Question. Do you intend to refocus on grants towards backlog reduction and/or capacity enhancement?

Answer. Our primary focus has always been on addressing forensic DNA evidence (including sexual assault evidence) backlogs and increasing capacity in our nation's state and local forensic science laboratories. We strongly believe that our holistic approach to reducing DNA backlogs is the most effective way to move toward our goal of ending the backlog problem.

Question. How much of the FY12 funding will be spent on activities outside of the Debbie Smith Act purpose areas as defined in 18 USC 14135(a)?

Answer. As stated in response to question 1a, NIJ plans to use a substantial amount of its FY 2012 forensics-related appropriations for purposes that align clearly with the stated purposes of the Debbie Smith DNA Backlog Grant Program (42 U.S.C. §14135(a)). Over 70 percent of NIJ's appropriations carve-out "for a DNA analysis and capacity enhancement program and for other local, State, and Federal forensic activities" will support the DNA Backlog Reduction Program, which involves activities that align with all of the Debbie Smith DNA Backlog Grant Program purposes stated at 42 U.S.C. §14135(a).

The "Solving Cold Cases with DNA" program also relates to the following purposes of the Debbie Smith DNA Backlog Grant Program stated at 42 U.S.C. §14135(a):

- To carry out DNA analyses of samples from crime scenes, including samples from rape kits, samples from other sexual assault evidence, and samples taken in cases without an identified suspect, for inclusion in CODIS (14135(a)(2)); and

- To ensure that DNA testing and analysis of samples from crimes, including sexual assault and other serious violent crimes, are carried out in a timely manner (14135(a)(5)).

In FY 2012, NIJ plans to use over \$7 million to fund the “Solving Cold Cases with DNA” program. Funding for both the DNA Backlog Reduction Program and for the “Solving Cold Cases with DNA” program in FY 2012 account for nearly 80 percent of the appropriations carve-out “for a DNA analysis and capacity enhancement program and for other local, State, and Federal forensic activities;” these two programs align clearly with the stated purposes of the Debbie Smith DNA Backlog Grant Program (42 U.S.C. §14135(a)).

The remaining 20 percent of this carve-out will be used to fund research and development on DNA forensics and other forensic disciplines, to help solve missing persons’ cases with DNA, and for forensics-related training, technical assistance, dissemination, outreach, and program support. These other activities will be associated with and are supportive of the Debbie Smith DNA Backlog Grant Program purposes. Few (if any) of the activities that NIJ supports with this appropriation can be said to have no connection to the stated purposes of the Debbie Smith DNA Backlog Grant Program, as all are intended either to support existing state and local DNA and other forensic capacity or build new State and local DNA and other forensic capacity.

Question. If the Congress agrees to fund the DNA budget from out of the Victims of Crime Fund, will the Department be focusing on grants that serve victims of crimes, such as reducing backlogged evidence samples and backlogged offender samples?

Answer. Yes. As discussed in the above answers, the Department will continue to focus much of its FY 2013 appropriations “for a DNA analysis and capacity enhancement program and for other local, State, and Federal forensic activities” on addressing forensic DNA backlogs by funding grants to state and local governments to support the processing of both evidence and offender (and, where applicable, arrestee) samples. NIJ’s focus will continue to be on addressing the DNA backlog problem through a combination of capacity building, research and development, funding assistance to continue support for victims of crime and help solve cold cases with DNA, and forensics-related training. NIJ is working closely with the Office for Victims of Crime to ensure that an understanding of and a sensitivity to the needs of crime victims continues to be the priority in our efforts to help reduce, and ultimately eliminate, the forensic DNA backlog problem in state and local crime laboratories.

METHAMPHETAMINE

The production, distribution and sale of Methamphetamine remains a serious concern in my State of California and across the nation. In CA, total methamphetamine production continues to exceed the combined production of the next three largest meth-producing states.

Meth usage is also increasing, which has serious consequences from a human and economic standpoint with the associated increased crime, treatment, and other social costs as well as the loss in productivity. All of this is occurring while law enforcement resources are being reduced at the state and local level.

I was pleased to see that Administration, after not requesting funding for multiple years, requested \$12.5 million in funding in the 2013 budget for the Methamphetamine grants initiative (aka Meth Hot Spots program) within the COPS office. Unfortunately, given the scope of the problem in states like California, \$12.5 million is merely a drop in the bucket. In addition, in recent years, much of this funding has been transferred to DEA for their meth lab cleanup efforts—also a much needed and underfunded initiative.

Given the scope of the problem, and the meth lab clean up needs at DEA, I am hoping that Congress will add additional funding to this effort so that DOJ has enough funding to release grants to once again help state not only clean up meth labs, but to vigorously investigate, arrest and prosecute meth manufacturers and traffickers.

Question. What programs does the Department hope to support with its request for 12.5 million in the Methamphetamine grants initiative?

Answer. In FY 2013, the Office of Community Oriented Policing Services (COPS) requests \$12.5 million to provide assistance to help stem clandestine methamphetamine production and its consequences, including the cleanup of clandestine laboratories. As in previous years, the Department assumes that these funds will provide for meth lab clean-up activities.

Question. Has there been an increase in meth related crimes that led the Department to request this funding?

Answer. Combating the production, distribution and sale of methamphetamine has been and continues to be a priority of the Administration and the Department of Justice. DEA spends over \$2.3 billion on drug enforcement activities, of which a portion is for methamphetamine enforcement. A similar amount is requested in the FY 2013 President's Budget. Along with funding from COPS, Byrne Justice Assistance Grant funding from the Bureau of Justice Assistance can be used by state and local agencies for cleanups of methamphetamine labs. The FY 2013 funding of \$12.5 million is not in direct response to an increase in methamphetamine-related crimes, but

reflects continued efforts to help states deal with problems associated with methamphetamine.

In FY 2010, DEA spent \$19.2 million to perform 10,089 cleanups of small toxic labs (a 33 percent increase in the number of cleanups performed in FY 2009). In FY 2011, DEA spent \$8.5 million to perform 5,693 cleanups. In FY 2012, DEA has available \$14.5 million to spend on the cleanup program.

INTELLECTUAL PROPERTY/MEGAUPLOAD

As we continue to recover from the global economic downturn, job creation is my top priority and a top priority for many of my colleagues in this body. That is why I feel so strongly about the need to address rampant copyright theft online, which kills job and hurts our competitiveness. Addressing these issues effectively is not easy or uncontroversial. We have to carefully weigh due process concerns and ensure that the Internet is kept a free and open space. Yet there is no doubt that rampant piracy is fundamentally unfair to creators, and that it destroys jobs and robs us of our economic competitiveness.

On that topic, I want to commend you and the Department for the January indictment of the New Zealand based cyberlocker, Megaupload. The indictment of Megaupload's founder and several of his employees on charges of criminal copyright infringement and racketeering is an example of a complicated criminal investigation yielding lasting and meaningful results.

Megaupload was not a small player. At one time, it was the 13th most visited site on the Internet by one measure. It got that enormous popularity by unscrupulously hosting copyrighted content, and in doing so it earned millions of dollars in advertising profits and subscription fees. It's clear from the indictment that the owners knew full well that they were in the piracy business, and hoped to do the bare minimum necessary to avoid prosecution.

This investigation and indictment are the direct result of the work of the FBI agents and AUSAs that have been dedicated by the Department, with the support of this Committee, to IP enforcement. And we're seeing the results of this investigation resonating, with other cyberlockers with questionable business practices voluntarily shutting down operations rather than face investigation.

Question. What are some of the challenges of dealing with online entities that are actively profiting from piracy? How about those that set up their operations overseas specifically to avoid US jurisdiction? What happens when a site is based in a country that, unlike New Zealand in the case of Megaupload, refuses to cooperate with US law enforcement?

Answer. Thank you for your recognition of the Department of Justice's efforts leading to the indictment of the seven individuals and two corporations charged with running an international criminal enterprise responsible for massive copyright infringement through Megaupload.com and other related sites. While much work still needs to be done in that case, the Department is committed to combating intellectual property (IP) crime in all its forms and will continue to vigorously pursue IP criminals wherever they reside.

The challenges in dealing with online entities that are actively profiting from piracy are significant. Many of these challenges were apparent during the recent takedown of the Megaupload criminal enterprise, even though New Zealand and Hong Kong were cooperative. As the question correctly infers, most of the infringing operations are overseas. The international nature of these operations enhances the difficulty of identifying the subjects and their organizational structure, tracing illegal funds, obtaining and analyzing digital evidence. In addition, there can often be specific legal obstacles (e.g., lack of criminal statutes in the hosting country for online piracy). Unfortunately, in instances where sites are in non-cooperative or hostile countries, there may not be an avenue for U.S. law enforcement action. There may be other options, such as civil remedies by victims and efforts by the Office of United States Trade Representative (USTR) through its Special 301 process, which is an annual review of the global state of intellectual property rights protection and enforcement. The Special 301 process also identifies a wide range of concerns, including troubling "indigenous innovation" policies that may unfairly disadvantage U.S. rights holders in China; the continuing challenges of copyright piracy over the Internet in countries such as Canada, Spain, Italy, and Russia; and the ongoing, systemic intellectual property rights enforcement issues presented in the many trading partners around the world.

Question. The Department's budget requests 14 new positions and \$5 million to place DOJ attaches in strategic countries to work on intellectual property crime. How will those positions improve our efforts to fight piracy and protect American jobs?

Answer. The additional resources we are seeking in FY 2013 would allow us to place six attachés, designated as International Computer Hacking and Intellectual Property (ICHIP) Coordinators, in key regions around the world. These ICHIP Coordinators would provide critical resources that would enable the Department to more effectively combat the increasing IP and cyber crime threats developing overseas through enhanced and sustained international engagement. As contemplated by the program and described in greater detail below, such efforts would increase the number and scope of coordinated international IP and cyber prosecutions, build foreign capacity to prosecute

such cases abroad, and help prosecutors make stronger cases in the U.S. by facilitating information and evidence sharing. This would significantly increase our ability to stop the crime at its source. The scope of the ICHIP Coordinator's responsibilities would build on the successful aspects of the Intellectual Property Law Enforcement Coordinator (IPLC) program as well as the domestic Computer Hacking and Intellectual Property (CHIP) Coordinator program in which specially trained Assistant U.S. Attorneys are available in each district.

Combating IP crime and cyber crime is essential to safeguarding our national and economic security, creating economic growth, and ensuring integrity, fairness, and competitiveness in the global marketplace. In today's environment, however, where virtually every significant IP crime and cyber crime investigated and prosecuted in the U.S. has an international component, it is impossible to address such crimes adequately without sustained and strong international engagement. Operating from abroad, which poses additional challenges for U.S. law enforcement, today's IP and cyber criminals are more technologically savvy than ever. They exploit new technology to develop increasingly sophisticated and diverse methods of committing every imaginable type of IP and cyber offense, including widespread online piracy, increased sales of counterfeit network hardware and other counterfeit goods that can threaten our national security and economic prosperity, corporate and state-sponsored economic espionage, and computer intrusions that can threaten national security or compromise and exploit personal and financial data. These types of crimes are also increasingly the province of organized criminal enterprises. In many cases, such crimes also overlap substantially with other economic crimes, including fraud, money laundering, tax evasion, and smuggling.

The Department has sought to address the international aspects of IP and cyber crime by making its efforts to strengthen international law enforcement relationships a top priority. These efforts are designed to increase cooperation and evidence sharing in criminal cases and to build capacity in foreign countries to prosecute these offenses. Building such foreign capacity would reduce the number of safe havens around the world for IP and cyber criminals and overcome jurisdictional and resource limitations in prosecuting crimes originating overseas.

The Department has also collaborated with other U.S. agencies and foreign law enforcement counterparts in this area through multi- and bilateral working groups as well as through multi-year training and technical assistance programs for foreign law enforcement, judiciary, and law makers. These efforts focus not only on law enforcement capacity building, but also on improving statutory regimes to ensure that law enforcement has the legal tools needed to respond quickly to the threat of Internet-based crime and the proliferation of electronic evidence in a wide range of offenses.

Based on over a decade of experience in these areas, it has become clear that being able to address threats at the source is a highly effective method to reduce IP and cyber crime. For example, working with foreign law enforcement to shut down a factory producing counterfeit pharmaceuticals can provide greater protection to the consumer than attempting to seize every individual package shipped from that factory into the U.S. Similarly, working closely with foreign counterparts to disrupt criminal networks that undertake phishing scams or deploy malicious code through viruses in the country of origin will often result in quicker results and greater deterrence than seeking to gather evidence and extradite defendants through traditional processes.

Placing ICHIP Coordinators in six critical areas will improve the ability to coordinate the Department's international efforts to suppress IP and cyber crime. Although instances of international crime may be addressed effectively by direct contact between prosecutors and investigators on specific cases, to address systemic and pervasive international IP crime and cyber threats effectively, greater and more sustained engagement is essential. The ICHIP program is an extension of the Department's IPLEC Program, through which the Department has deployed experienced federal prosecutors overseas since 2006 to take the lead on our intellectual property protection efforts in key regions including Asia and, until March 2011 (when State Department funding expired), Eastern Europe. Through the IPLEC program, the Department has seen a substantial increase in foreign enforcement and cooperative casework where U.S. law enforcement has had a visible and ongoing presence in the most active countries or regions. This budget item would allow for the expansion of the program to additional critical regions, and also to cover the rapidly developing and overlapping area of international cybercrime.

GUN TRAFFICKING

The mutually destructive trade of guns and drugs with Mexico is a tragedy for both nations, and I believe we must do more to help. Mexican President Felipe Calderon last week took the remarkable step of erecting an enormous billboard on the border, facing the United States, with the simple request "No More Weapons." The sign was built with the crushed remains of destroyed firearms, just a few of the 140,000 seized from the Cartels by Mexican authorities since 2006.

I'm working on legislation that would establish a two year mandatory minimum for straw purchasers if they purchased two or more weapons on behalf of a person prohibited from buying a gun and if they did so with the intent to conceal the identity of the true purchaser. This is in response to hearing from many ATF agents and federal prosecutors that straw purchasing is treated as a mere paperwork violation. Straw purchasers are the first step

in the chain that leads guns from law abiding American gun dealers to violent criminals. We need penalties commensurate with the damage.

Question. What are some of the difficulties you've heard from law enforcement working on gun trafficking issues?

Answer. The trafficking of firearms to violent criminals, gangs, and drug trafficking organizations—whether between or into our cities or across the Southwest border—presents a grave threat to public safety. Straw purchasers—individuals without a criminal record who purchase firearms for drug dealers, violent criminals, or other prohibited persons—are the lynchpins of most firearms trafficking operations. Straw purchasers, who often acquire a relatively small number of firearms in each transaction, make it possible for firearms traffickers to effectively circumvent the background check and record-keeping requirements of Federal law to get guns into the hands of criminals.

Because there is no federal statute that specifically prohibits straw purchasing, prosecutors rely primarily on 18 U.S.C. §922(a)(6), which prohibits making a material false statement, typically on a Firearms Transaction Record, ATF Form 4473, in connection with the purchase of a firearm from a Federal Firearms Licensee (FFL), and 18 U.S.C. §924(a)(1)(A), which prohibits making a false statement with regard to any information that FFLs are required by law to keep on file. In such prosecutions, the government generally must rely on written statements to the licensed dealer on a Form 4473. Although each of these offenses is a federal felony (10 years for 922(a)(6); 5 years for 924(a)(1)(A)), the actual penalties meted out for such violations—which often are perceived as simple “paperwork” offenses—are typically far too low to serve as a meaningful deterrent, provide for consistent and proportionate sentences, or accurately reflect the violence associated with gun trafficking. Due in large part to the low penalties they face, defendants arrested for straw purchasing or related conduct have little or no incentive to cooperate with law enforcement, which frustrates efforts to identify other members and leaders of trafficking schemes and to build cases against those individuals and their organizations.

In addition to false statements about whether a purchaser is prohibited from possessing a gun, or whether the purchaser is in fact the true purchaser of the firearm, there are other types of statements on Form 4473 that are material to the lawfulness of a sale and that, if false, would support a prosecution under section 922(a)(6). For instance, the purchaser's identity, age (in particular, whether the buyer is under 18 or 21, depending on the type of firearm involved), and place of residence (Federal law prohibits an FFL from transferring a handgun to an out-of-state buyer) are all material to the completion of a firearms transaction. This information is essential, not

only to prevent prohibited persons from obtaining firearms, but also to trace firearms used in criminal activities. Unless the information in FFL records is accurate, ATF cannot later identify and locate the actual purchasers of crime guns or develop leads to locate criminals. However, some courts have declined to find false statements about such matters to be “material.” This has resulted in the dismissal of indictments charging 922(a)(6) and made it difficult for law enforcement officers to bring charges against straw purchasers. In many cases, these straw purchasers are working for middlemen who may not themselves be prohibited persons, but who are working to supply firearms to violent criminal organizations.

Question. Do you believe we have sufficient statutes and penalties in place, or is there a need for Congress to look at what is on the books and how it can be improved?

Answer. As described in the previous answer, there are several critical challenges limiting law enforcement’s ability to identify and prosecute persons and organizations engaged in illegal firearms trafficking, including the statutes under which such offenses typically must be charged and sentenced. Nevertheless, the Department remains committed to ensuring that firearms are not purchased by prohibited persons or used for illicit purposes and will continue to use all available tools to prevent firearms trafficking and gun violence. We do believe that there are several concrete steps that Congress could undertake that would assist that effort:

1. *Enact a Federal Firearms Trafficking Statute.*—As noted above, there is no federal statute that specifically prohibits straw purchasing or firearms trafficking itself. Instead, prosecutors rely primarily on “paperwork” provisions in Title 18 that prohibit making false statements in connection with the purchase of a firearm. We ask Congress to enact a comprehensive firearms trafficking statute to directly target criminal enterprises that utilize straw purchasers to assemble arsenals and supply weapons to criminal organizations.
2. *Strengthen Penalties for Straw Purchasing of Firearms.*—Also as described above, the penalties imposed for the paperwork violations described above often are too low to serve as a meaningful deterrent or to account for the violence associated with gun trafficking. Due in large part to the low penalties they are likely to face, defendants arrested for straw purchasing or related conduct have little or no incentive to cooperate with law enforcement, which frustrates prosecutors’ efforts to build cases against the leaders of gun trafficking schemes. Although the Sentencing Commission recently adopted changes to the Sentencing

Guidelines applicable to straw purchasing, Congress should amend Title 18 to provide stiffer penalties in gun trafficking cases.

3. *Do Not Block ATF from Receiving Useful Intelligence About Gun Trafficking.*—Last year, ATF established a common sense requirement that gun dealers in the border states report multiple sales of certain long guns to law enforcement, just as they have long been required to report multiple sales of handguns. The House of Representatives voted to withhold funding for this requirement, notwithstanding the fact that a court subsequently concluded that the requirement is “properly limited in scope.” *The National Shooting Sports Foundation, Inc. v. B. Todd Jones, Acting Director, Bureau of Alcohol, Tobacco, Firearms & Explosives*, Civil Action No. 11–1401 (RMC), slip op. at 2 (D.D.C. Jan. 13, 2012).

Question. Will you work with Congress and the authorizing committees to recommend changes to the law to support prosecutions of gun traffickers?

Answer. Yes, the Department would be pleased to work with Congress and the authorizing committees to discuss possible changes to the law that would support our efforts to investigate and prosecute persons engaged in firearms trafficking.

Question. How does the Department intend to confront gun trafficking on our border? What steps and funding are provided in this budget to accomplish that?

Answer. The Department is working diligently to address and interdict firearms trafficking to Mexico. Each year, the Department spends nearly \$2 billion for law enforcement and prosecutorial initiatives along the Southwest Border. The FY 2013 Budget request includes a similar amount for these efforts. The Department’s efforts include identifying the sources of firearms trafficking, enforcing the rule of law in the Southwest Border region, and working with the border states and the Government of Mexico to enhance their law enforcement capabilities. Some examples of the Department’s efforts and successes are highlighted below.

- Starting in FY 2006, the ATF formed teams of agents specifically to address gun trafficking on the Southwest Border. Their investigations have led to the seizure of more than 10,000 firearms and 1.3 million rounds of ammunition destined for Mexico.
- The DEA’s El Paso Intelligence Center (EPIC) supports law enforcement and interdiction components through timely analysis and dissemination of intelligence on criminal organizations throughout the country, but with a specific focus on criminal activity along the Southwest Border.

The DEA also continues to equip and train Mexican Special Investigative Units (SIUs) to enhance Mexico's police and prosecutor capacity, investigate money laundering, and improve interdiction capability.

- The FBI has established nine hybrid squads in key border offices to develop investigations and intelligence across field offices. The FBI has also enhanced its Border Liaison Officer (BLO) program to facilitate the exchange of intelligence with Mexican law enforcement.
- In FY 2011, the U.S. Attorneys' Offices in the Southwest Border region charged over 86,000 defendants with federal immigration, firearms, violent crime or drug trafficking offenses. The Department has also sought the extradition of the most serious cartel members from Mexico to face justice in the U.S. As the Department's lead in combating firearm trafficking, ATF brings a tremendous amount of resources and a variety of tools to this effort, including:
 - *eTrace*.—A law enforcement tool used to identify potential firearms traffickers.
 - *Integrated Ballistics Identification System (IBIS)*.—A national system for ballistic imaging that enables the capture and comparison of images of bullets and cartridges to aid in solving violent crimes that involve the use of firearms; ATF and the Mexican Federal Police (PGR) have established an IBIS Memorandum of Understanding, which will facilitate the sharing of important ballistics information.
 - *Training and Technical Support*.—Firearms trafficking enforcement training courses, recently revised to focus on providing the skills and knowledge necessary to identify, investigate and prosecute firearms traffickers. In addition to ATF personnel, these courses are provided to prosecutors, state and local law enforcement, and foreign partners.
 - *Bilateral (U.S.–Mexico) Firearms and Explosives Trafficking Assessment*.—A bilateral effort with the Government of Mexico to draft a comprehensive assessment of firearms and explosives trafficking between the two countries.

QUESTIONS FOR THE RECORD—MR. HONDA

Question. In the FY13 request, the funding for SCAAP has been cut in half. At what point do we as a country have to come to a solution on this issue that goes beyond just partial reimbursement? Last year when you were before this subcommittee you pointed to immigration reform as an answer, but barring that, what is the Department doing to help these states beyond, what in my view, is clearly insufficient funding for reimbursement?

Answer. The funding for the State Criminal Alien Assistance Program (SCAAP), while reduced, still provides for a baseline level of funding for states and localities in order to defray detention costs related to criminal aliens. In FY 2013, the Department requests funding for programs that provide for evidence-based public safety programs and capacity building.

The United States Attorneys' Offices (USAOs) continue to prosecute a high number of immigration-related criminal offenses. From FY 1999 to FY 2011, the USAOs increased their prosecution of felony immigration offenses from 11,580 cases against 12,650 defendants to 28,806 cases against 29,873 defendants. During that period, the USAO community more than doubled the number of felony immigration cases filed in federal courts. In fact, in FY 2011, immigration enforcement accounted for 41.8% of the nation's total felony case filings. These numbers do not include the additional 53,900 defendants prosecuted in U.S. Magistrate Courts for misdemeanor immigration criminal offenses. In FY 2011, a total of 83,773 defendants were prosecuted for immigration criminal offenses by the USAO community.

Question. It has been reported that since 9/11 the New York City Police Department and the CIA have engaged in overbroad and discriminatory efforts to collect information on the Muslim community without the establishment of reasonable suspicion and outside the scope of joint operating agreements. There have been reports that Muslim college students are now afraid to attend prayer services or speak at organizational meetings that the NYPD conducted surveillance on. I believe this shows that the NYPD's actions have had a "chilling effect" on First Amendment activities. What is the process the Department of Justice takes to investigate claims such as these and what is the general timeframe?

Answer. The Attorney General has authority to bring litigation to address patterns or practices by law enforcement agencies that deprive persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. 42 U.S.C. sec. 14141. This authority has been delegated to the Civil Rights Division of the Department of Justice, and the Division often works with the local U.S. Attorney's Office. The Division receives thousands of allegations of misconduct by law enforcement officials each year. Each allegation is reviewed and, in a portion of cases, a formal investigation or another response is authorized. Investigations typically involve site visits, hundreds of interviews and the review of tens of thousands of pages of documents. In addition to Division attorneys and investigators, the Division engages experts, typically well-respected law enforcement executives, to assist in the investigation. There is no way for us to provide a general

timeframe for a preliminary inquiry or a formal investigation. Timelines for inquiries and investigations are controlled by the facts found.

Question. 2011 was a difficult and unusually violent year to be a law enforcement officer, and California was no exception. 66 officers were murdered in the line of duty with firearms—a 10% increase in firearms-related deaths for those in the line of duty, as compared with 2010. Is DOJ or the FBI keeping track of whether the shooters in these cases were prohibited firearms purchasers? Or whether they went through a background check for the weapon used in the police shooting? If not, why not? What changes in federal gun laws would be helpful as you seek the address these increased shootings with your VALOR program?

Answer. The unfortunate reality is that—despite measured improvements in the overall crime rate—incidents of violence against law enforcement officers are approaching the highest levels we’ve seen in nearly two decades. Last year, according to statistics maintained by the National Law Enforcement Officers Memorial Fund, a total of 177 federal, state, and local law enforcement officers lost their lives in the line of duty—a 16 percent increase over 2010. This represents a devastating and unacceptable trend—and a cause that demands our best and most innovative efforts. The Department’s efforts to protect law enforcement officers include critical programs like VALOR and the Bulletproof Vest Partnership. VALOR is a Bureau of Justice Assistance (BJA) program designed to prevent violence against law enforcement officers and ensure officer resilience and survivability following violent encounters during the course of their duties. VALOR responds to the precipitous increase in ambush-style assaults that have taken the lives of many law enforcement officers in recent months. More than 2,900 law enforcement professionals have received VALOR training, in 16 sessions across the country; every VALOR training session to date has had some federal law enforcement representation.

The Department takes gun crimes very seriously, particularly when it is directed against law enforcement. We use all the tools available to us to vigorously enforce the laws that Congress has passed to protect the public. The Department will continue to work closely with Members of Congress to provide the very best tools to the law enforcement community to address violent crime.

While we are required by law to destroy transaction content related to firearms transfers within 24 hours when a background check determines that the transaction may proceed, we are permitted to retain records indicating a denied firearm purchase from a Federal Firearms Licensee. Consequently, while we do not routinely conduct reviews after fatal shootings to determine whether a suspect has been denied a firearm purchase because of a statutory

disqualification, if an investigation warrants it we would be able to do so. We would not, though, be able to determine if the suspect was previously permitted to purchase a firearm. Determining how a suspect acquired a firearm would likely depend on the use of traditional investigative techniques, including a trace of the firearm by the ATF.

Question. In June 2011, Al Qaeda issued a video message featuring Adam Gadahn, an American-born member of the terrorist group, urging followers to commit violent acts by exploiting weaknesses in U.S. gun laws and the gun background check system. California has robust state laws which now require a background check regardless of where the gun is sold. But in many of our neighboring states, it is very easy for a terrorist, former criminal or domestic violence abuser to circumvent the system and buy a gun from a gun show or occasional seller. Do you consider these weaknesses in our background check system to be a national security threat? What is the department doing to ensure that only legal buyers are purchasing guns?

Answer. In many states, private sales do present an opportunity for persons prohibited by state or federal law from possessing firearms to bypass the background check system. Although the FBI is not permitted by law to process firearm background checks for a person not licensed through the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the National Instant Criminal Background Check System (NICS) regulations, Title 28, Code of Federal Regulations, Part 25, do authorize states to access the NICS in connection with firearm and explosives-related background checks for permits and licenses. This use of the NICS does assist states in ensuring compliance with both federal and state firearms laws by their citizens and within their boundaries.

The FBI is committed to processing firearm background checks and rendering timely and accurate transaction determinations within the scope of the law. The Brady Handgun Violence Prevention Act of 1993, Public Law 103-159, allows up to three business days within which to complete a background check, after which time the firearm may be transferred if the transaction has not been denied. Accordingly, the FBI works diligently within those three business days to research all available criminal history and other disqualifying information to ensure that only lawful purchasers are allowed to obtain firearms from licensees. The FBI considers this to be a critical part of its mission to ensure national security and public safety.

There are generally two types of firearms sellers who operate at gun shows: Federally licensed firearms dealers and non-licensed private sellers. ATF inspects licensed firearms dealers to ensure they are conducting background checks and maintaining records of their firearms transactions. If dealers are

found to have willfully sold firearms to persons prohibited by federal law from receiving them, ATF will take corrective action, which may include initiating a license revocation proceeding, denying a license renewal, or in appropriate cases, referring the dealer for federal prosecution. ATF also investigates and refers for prosecution persons who are engaged in the business of selling firearms without a license, which is a violation of the Gun Control Act, Title 18 U.S. Code, Chapter 44. With respect to private sellers who are not engaged in the business, there is no federal requirement to conduct a background check on a prospective purchaser of one of their firearms. Persons who only occasionally sell firearms or liquidate their personal collections—whether at gun shows or otherwise—are not required to obtain a federal license, and are not required to abide by the ATF regulations that apply to licensed dealers, such as maintaining records of the firearms they sell.

Question. As you may already know, there have been multiple reports of sexual abuse in U.S. immigration detention facilities. I am concerned that this has become a growing crisis that continues to be inadequately addressed. I believe the best way to ensure the safety of all detainees is to fully implement the Prison Rape Elimination Act national standards by not only your Department, but DHS and HHS as well. How have you collaborated with Secretary Napolitano and Secretary Sebelius to ensure that their respective Departments will also implement these regulations in immigration detention facilities?

Answer. The PREA final rule, which will be published soon, will address this question.

WEDNESDAY, MARCH 7, 2012.

FEDERAL BUREAU OF INVESTIGATION

WITNESS

ROBERT S. MUELLER III, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

OPENING STATEMENT—MR. WOLF

Mr. WOLF. The hearing will come to order.

Director Mueller, you are here this morning to testify regarding the fiscal year 2013 budget request for the Federal Bureau of Investigation.

I want to take this opportunity to express our deep appreciation that you agreed to extend your service and continue in the outstanding job you have done as the Director of the Bureau. We are well aware of the difficult job it is and the sacrifices it requires, and we want to thank you and thank your family.

I also want to thank the men and women of the FBI who work to keep this country safe and secure. I am grateful for their service, and I hope you will convey that to them.

In fiscal year 2013, you are seeking an appropriation of \$8.2 billion, an increase of \$114 million or 1.4 percent. However, the request also proposes to rescind \$162 million from your existing funding. So, in reality, the administration is proposing a net reduction of almost \$50 million for the FBI.

For the first time in many years that I can remember, there are no increases being requested for any of your national security functions. Preventing terrorism and promoting national security is the top strategic goal of the Justice Department, so the committee will be interested to hear why the budget does not seem to reflect that priority. Or perhaps you have reached a point that enough is enough.

Your request is modest in comparison with recent years, but that reflects the fiscal climate in which we are operating, and we appreciate your assistance in finding ways to economize and limit spending.

We look forward to your testimony on your budget request as well as on the FBI's continuing transformation activities to fulfill its role as the key domestic counterterrorism and intelligence agency. The committee will also be pleased to hear about your implementation of various initiatives carried in fiscal year 2012 appropriations, including important increases in funding for surveillance, the High-Value Detainee Interrogation Group, and the continuing efforts to control violent gang crime.

Before I recognize you to present your testimony, I would like to recognize my colleague, Ranking Member Mr. Fattah, for any comments he would like to make.

OPENING STATEMENT—MR. FATTAH

Mr. FATTAH. Thank you, Mr. Chairman.

Let me welcome the Director again to the committee, and we look forward to your testimony.

Let me say that it has been since the beginning of this administration that we have had an opportunity to see this work in process in which the FBI has continued to focus in on the reduction of crime. And crime is down. In fact, crime has been down since your tenure started, and you have done a tremendous service to the country. The preliminary numbers look like there is another 6.5 percent decrease since the 2011 numbers.

And so I know that a lot of spotlight is on terrorism and other issues that I will talk about in a second, but in terms of violent crime in America, it continues to go down, contrary to the normal, conventional wisdom that when we have a downturn in the economy you would see an uptick in crime. I would like to think that based on the 34,000 or so people who follow your leadership at the FBI, that has had a lot to do with it.

I know when we left here on a break a few weeks ago, there was a major arrest, someone who had it in their mind, at least, to blow up the Capitol, create some havoc here. And so we all know that you are doing tremendous work.

I had an opportunity to visit the Terrorist Screening Center out in Virginia. The Chairman gave me a pass for the day and let me go to Virginia. It was just amazing to see the collaborative relationships and the work that is being done. A lot of credit has to be given to you personally, because since 9/11 you have been in the hot seat and the burden of the safety of the country has really been, in large measure, on your shoulders as the FBI has shifted into preventing terrorist attacks—different from, perhaps, catching criminals after they have committed a crime. So it is a different type of work, but the team that you have put in place has done an excellent job in that respect.

I do want to apologize on the front end. I have double duty this morning at Energy and Water around the Nuclear Regulatory Commission's report because our ranking member there can't be here today, so I have to go. But there will be another Member here before I leave, Mr. Chairman, who will stand in for me.

So when I leave, it is not because of anything you said; it is just that I have other responsibilities.

And I thank the Chairman for conducting this hearing today. I think it is important as part of the transparency of our process. Thank you.

Mr. WOLF. Thank you, Mr. Fattah.

Mr. Director, you are welcome to read your testimony or summarize as you see fit.

OPENING STATEMENT—DIRECTOR MUELLER

Mr. MUELLER. I just have a short summary, Mr. Chairman. I thank you for having me here today, and Ranking Member Fattah as well. I appreciate the opportunity to appear before this committee and discuss our 2013 budget.

As both of you and the committee know, the FBI continues to face unprecedented and increasingly complex challenges. We must identify and stop terrorists before they launch attacks against our citizens. We must protect our government, our businesses, and our critical infrastructure from espionage and from the potentially devastating impact of cyber-based attacks. We must root out mortgage fraud, fight white-collar and organized crime, stop child predators, and protect civil rights. And we must uphold civil liberties and the rule of law while carrying out this broad mission.

For fiscal year 2013, the FBI has requested a budget of \$8.2 billion to fund more than 13,000 special agents, more than 3,000 intelligence analysts, and more than 18,000 professional staff. This funding level will allow the FBI to maintain our base operations, with a small increase for financial and mortgage fraud investigations.

Let me, if you would, Mr. Chairman, summarize the key national security and criminal threats that this funding will address.

Over the past year, the Bureau has faced an extraordinary range of threats from terrorism, espionage, cyber intrusions, and traditional crime. Let me talk first about the terrorist threat.

Although Osama bin Laden and other key leaders have been removed, al-Qaeda and its affiliates remain the top terrorist threat to the United States. Core al-Qaeda operating out of Pakistan remains committed to high-profile attacks against the West. Meanwhile, al-Qaeda affiliates and adherents have attempted several attacks on the United States.

We are also concerned about the threat from homegrown violent extremists. As the ranking member pointed out, last month we arrested Amine El Khalifi, a 29-year-old Moroccan immigrant, who was allegedly, according to the indictment, attempting to detonate a bomb in a suicide attack on the U.S. Capitol Building. Over the past year, we have seen similar attempts by homegrown extremists in Florida, Massachusetts, Texas, and Washington State. And these cases exemplify the need to continue to enhance our intelligence capabilities to get the right information to the right people before any harm is done.

Turning to the foreign intelligence threat. The foreign intelligence services continue their traditional efforts to obtain military and state secrets, but they also seek technology and intellectual property from companies and universities. For example, last year, a long-time Northrop Grumman engineer was sentenced to 32 years in prison for selling secrets related to the B-2 stealth bomber to several nations, including China. And last fall, a former Dow Chemical scientist pleaded guilty to transferring stolen trade secrets to individuals in Europe and China. These are just a few examples of the growing insider threat from employees who may use their access to commit economic espionage.

Let me focus for a moment on the cyber threat. This is going to be an area of particular focus for the FBI in coming years, as cyber crime cuts across all of our programs.

Terrorists are increasingly cyber-savvy. Like every other multinational organization, they are using the Internet to grow their business and to connect with like-minded individuals, and they are not hiding in the shadows of cyberspace.

Terrorists using the Internet are not our only national security concern, however. State-sponsored computer hacking and economic espionage pose significant challenges as well. Just as traditional crime has migrated online, so too has espionage. Hostile foreign nations seek our intellectual property and our trade secrets for military and competitive advantage. The result is that we are losing data, money, ideas, and innovation. And, as individual citizens, we are increasingly vulnerable to losing our private information.

Over the last several years, we have built substantial expertise to stay ahead of these threats, both at home and abroad. This has been with the help of this committee in financing and augmenting our resources to address it. We now have cyber squads in every one of our 56 field offices and more than 1,000 specially trained agents, analysts, and forensic specialists. We have individuals located in many of our 63 legal attaché offices with cyber expertise. And we have agents embedded in our counterpart police departments in places like Romania, Estonia, Ukraine, and the Netherlands. And here at home, we lead the National Cyber Investigative Joint Task Force, which brings together 18 law enforcement, military, and intelligence agencies to stop current and to prevent future attacks.

Together, we are making progress. I might point out that yesterday ourselves and DOJ announced charges against six hackers who aligned themselves with the group known as “Anonymous.” According to the charges, they were responsible for a broad range of high-profile cyber intrusions targeting companies, the media, and law enforcement since 2008. A number of these individuals were arrested yesterday in Ireland, the United States, and the U.K. And this case was successful, I should point out, because we worked extensively with our overseas partners and used our traditional investigative and intelligence techniques in the cyber arena.

In the FBI, we must continue to ensure that cyber agents and analysts have the greatest possible skill set to address cyber crimes and that all of our special agents have the fundamental skills to operate in the cyber environment. And just as we did after September 11th, we must continue to break down the walls and share information to succeed in combating the cyber threat. Just as we do with terrorism, we must identify and stop cyber threats before they do harm. It is not enough to build up our defenses and investigate the harm after the fact.

Lastly, let me spend a moment discussing the most significant threats in the criminal arena.

From foreclosure fraud to subprime scams, mortgage fraud remains a serious problem. In fiscal year 2011, the FBI had more than 3,000 pending mortgage fraud investigations—more than four times the number of cases we had in 2005. And nearly 70 percent of these investigations included losses of more than \$1 million. In our budget, we are requesting a program increase of \$15 million and 44 new positions to address the mortgage and financial frauds at all levels.

The focus on healthcare fraud is no less important. The Federal Government spends hundreds of billions of dollars every year to fund Medicare and other healthcare programs. Together with our partners at the Department of Health and Human Services, the Bureau has more than 2,600 active healthcare fraud investigations.

In fiscal year 2011, these efforts led to the recovery of more than \$4 billion in taxpayer dollars.

Turning to gangs and violent crime, they continue to exact a high toll on our communities. According to the National Gang Intelligence Center, there are more than 30,000 gangs with more than 1 million active members in the United States today. Through Safe Streets and Safe Trails Task Forces, the Bureau identifies and targets the most serious gangs operating as criminal enterprises and continues to disrupt those enterprises, in conjunction and working with our State and local law enforcement partners.

The continued violence along the Southwest border remains a significant threat. We rely on our collaboration with the Southwest Intelligence Group, OCDETF Fusion Center, and El Paso Intelligence Center to work together to track and disrupt this particular threat.

Finally, the FBI remains vigilant in its efforts to remove predators from our communities and to keep our children safe. We have ready response teams stationed across the country to respond quickly to child abductions. Through our Child Abduction Rapid Deployment Teams, Innocence Lost National Initiative, and Innocent Images National Initiative, the FBI and its partners are continuing to make the Nation safer for our children.

As I said, the FBI budget proposal for fiscal year 2013 seeks to maintain our current base resources and capabilities in a restrained fiscal environment. These resources are critical for us to continue responding to the broad range of national security and criminal threats I have outlined today.

Chairman Wolf, Ranking Member Fattah, members of the committee, I would like to close by again thanking you for your leadership and support of the FBI and its mission and thank you, in particular, for your support of each of the 34,000 FBI personnel, agents, analysts, professional staff who work day-in and day-out to protect the country.

Your investments in our workforce, our technology, and our infrastructure continues to make a difference in our ability to protect the American public day-in and day-out. Whatever transformation there has been in the FBI in the wake of September 11th is in large part attributable to the funds that have been provided through this committee and other committees in Congress. And for that, each of us thanks you.

I would be happy to answer any questions you might have.

Mr. WOLF. Thank you, Mr. Director.

[The information follows.]

STATEMENT OF ROBERT S. MUELLER, III
DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES

March 7, 2012

Good morning Chairman Wolf, Ranking Member Fattah, and members of the Subcommittee. On behalf of the over 34,000 men and women of the FBI, I would like to thank you for the years of support you have provided to the Bureau.

The FBI remains focused on defending the United States against terrorism, foreign intelligence, and cyber threats; upholding and enforcing the criminal laws of the United States; protecting civil rights and civil liberties; and providing leadership and criminal justice services to federal, state, municipal, and international agencies and partners. Our continued ability to carry out this complex and demanding mission reflects the support and oversight provided by this Subcommittee.

More than 10 years after the terrorist attacks of 9/11, the FBI continues to be a threat-focused, intelligence-driven organization that is guided by clear operational strategies. And we remain firmly committed to carrying out these strategies under guidelines established by the Attorney General that protect the civil liberties of those entrusting us with the authorities to carry out our mission.

As our Nation's national security and criminal adversaries constantly adapt and evolve, so must the FBI be able to respond with new or revised strategies and operations to counter these threats. The FBI continues to shift to be more predictive, preventative, and actively engaged with the communities we serve. The FBI's evolution has been made possible by greater use of technology to gather, analyze, and share information on current and emerging threats; expansion of collaboration with new partners, both domestically and internationally; and investments in training, developing, and maximizing our workforce. The FBI continues to be successful in maintaining this momentum of transformation even during these challenging times.

The FBI's fiscal year (FY) 2013 budget request totals \$8.2 billion in direct budget authority, including 34,083 permanent positions (13,018 Special Agents, 3,025 Intelligence Analysts, and 18,040 Professional Staff). This funding level continues increases provided to the Bureau in the past, most recently in FY 2012, allowing the FBI to maintain its forward progress, including targeting additional resources on investigating financial and mortgage fraud.

Let me briefly summarize the key national security threats and crime problems that this funding supports.

National Security Threats

Terrorism: The terrorist threat facing the United States remains complex and ever-changing. We are seeing more groups and individuals engaged in terrorism, a wider array of terrorist targets, greater cooperation among terrorist groups, and continued evolution and adaptation in tactics and communication.

While Osama bin Laden and certain other key leaders have been removed, al Qaeda and its affiliates and adherents continue to represent the top terrorism threat to the United States abroad and at home. Core al Qaeda remains committed to high-profile attacks against the United States. Additionally, al Qaeda affiliates and surrogates, such as al Qaeda in the Arabian Peninsula (AQAP), represent significant threats to our Nation. These groups have attempted several attacks against the homeland and our citizens and interests abroad, including the failed Christmas Day airline bombing in 2009 and the attempted bombing of U.S.-bound cargo planes in October 2010.

In addition to al-Qaeda and its affiliates, the United States faces a terrorist threat from self-radicalized individuals. Self-radicalized extremists – often acting on their own – are among the most difficult to detect and stop. For example, just last month, the FBI arrested Amine El Khalifi, a 29-year-old Moroccan immigrant, for the suspected attempt to detonate a bomb in a suicide attack on the U.S. Capitol Building. According to court documents, Khalifi believed he was conducting the terrorist attack on behalf of al Qaeda and had become radicalized even though he was not directly affiliated with any group. The Khalifi case exemplifies the need for the FBI to continue to enhance our intelligence capabilities – to get critical information to the right people at the right time – *before* any harm is done.

The basis from which acts of terrorism are committed – from organizations to affiliates/surrogates to self-radicalized individuals – continue to evolve and expand. Of particular note is al Qaeda’s use of on-line chat rooms and web-sites to recruit and radicalize followers to commit acts of terrorism. And they are not hiding in the shadows of cyber space: al Qaeda in the Arabian Peninsula has produced a full-color, English-language online magazine. Terrorists are not only sharing ideas; they are soliciting information and inviting communication. Al Shabaab, the al Qaeda affiliate in Somalia, uses Twitter to taunt its enemies – in English – and encourage terrorist activity.

To date, terrorists have not used the Internet to launch a full-scale cyber attack, but we cannot underestimate their intent. Terrorists have shown interest in pursuing hacking skills. And they may seek to train their own recruits or hire outsiders, with an eye toward pursuing cyber attacks.

These adaptations of the terrorist threat make the FBI’s counterterrorism mission that much more difficult and challenging.

Foreign Intelligence. While foreign intelligence services continue traditional efforts to target political and military intelligence, counterintelligence threats now include efforts to obtain technologies and trade secrets from corporations and universities. The loss of critical research and development data, intellectual property, and insider information poses a significant threat to national security.

For example, last year, Noshir Gowadia was sentenced to 32 years in prison for selling secrets to foreign nations. For 18 years, Gowadia had worked as an engineer at Northrop Grumman, the defense contractor that built the B-2 stealth bomber. Gowadia, a naturalized United States citizen from India, decided to offer his knowledge of sensitive design aspects of the B-2 to anyone willing to pay for it. He sold highly classified information about the B-2’s stealth technology to several nations, and made six trips to China to assist them in the development of stealth technology for their cruise missiles.

Last fall, Kexue Huang, a former scientist for two of America's largest agriculture companies, pled guilty to charges that he sent trade secrets to his native China. While working at Dow AgriSciences and later at Cargill, Huang became a research leader in biotechnology and the development of organic pesticides. Although he had signed non-disclosure agreements, he transferred stolen trade secrets from both companies to persons in Germany and China. His criminal conduct cost Dow and Cargill millions of dollars.

And just last month, five individuals and five companies were indicted in San Francisco with economic espionage and theft of trade secrets for their roles in a long-running effort to obtain U.S. trade secrets for the benefit of companies controlled by the government of the People's Republic of China (PRC). According to the indictment, the Chinese government sought to obtain a proprietary chemical compound developed by DuPont to be produced in a Chinese factory.

These cases illustrate the growing scope of the "insider threat" from employees who use their legitimate access to steal secrets for the benefit of another company or country. Through our relationships with businesses, academia, U.S. government agencies, and with other components of the Department of Justice, the FBI and its counterintelligence partners must continue our efforts to identify and protect sensitive American technology and projects of great importance to the United States government.

Cyber: Cyber attacks and crimes are becoming more commonplace, more sophisticated, and more dangerous. The scope and targets of these attacks and crimes encompass the full range and scope of the FBI's national security and criminal investigative missions. Our national security secrets are regularly targeted by foreign and domestic actors; our children are targeted by sexual predators and traffickers; our citizens are targeted for fraud and identity theft; our companies are targeted for insider information; and our universities and national laboratories are targeted for their research and development. Since 2002, the FBI has seen an 84 percent increase in the number of computer intrusions investigations opened. Hackers – whether state sponsored, criminal enterprises, or individuals – constantly test and probe networks, computer software, and computers to identify and exploit vulnerabilities.

Just as the FBI has transformed its counterterrorism program to deal with an evolving and adapting threat, the Bureau is enhancing its cyber program and capabilities. To counter the cyber threat, the FBI has cyber squads in each of our 56 field offices. The FBI now has more than 1,000 specially trained agents, analysts, and digital forensic examiners that run complex undercover operations and examine digital evidence. Along with 20 law enforcement and intelligence agency partners, the FBI is the executive agent of the National Cyber Investigative Joint Task Force. The task force operates through Threat Focus Cells—smaller groups of agents, officers, and analysts from different agencies, focused on particular threats.

In April of this year, the FBI brought down an international "botnet" known as Coreflood. Botnets are networks of virus-infected computers controlled remotely by an attacker. To shut down Coreflood, the FBI took control of five servers the hackers had used to infect some two million computers with malware. In an unprecedented step, after obtaining court approval,

we responded to the signals sent from the infected computers in the United States, and sent a command that stopped the malware, preventing harm to hundreds of thousands of users.

Over the past year, the FBI and our partners have also pursued members of Anonymous, who are alleged to have coordinated and executed distributed denial of service attacks against various Internet companies. To date, 16 individuals have been arrested and charged in more than 10 states as part of this ongoing investigation. According to the indictment, the Anonymous group referred to the DDoS attacks as “Operation Avenge Assange” and allegedly conducted the attacks in support of Wikileaks founder Julian Assange. The defendants are charged with various counts of conspiracy and intentional damage to a protected computer.

U.S. law enforcement and intelligence communities, along with our international and private sector partners, are making progress. Technological advancements and the Internet's expansion continue to provide malicious cyber actors the opportunity to harm U.S. national security and the economy. Given the consequences of such attacks, the FBI must be able to keep pace with this rapidly developing and diverse threat.

Criminal Threats

Criminal organizations – domestic and international – and individual criminal activity also represent a significant threat to our security and safety in communities across the Nation. The FBI focuses on many criminal threats, from white-collar crime and health care fraud to organized crime and gang violence to corruption and violence along the Southwest border. Today, I would like to highlight a number of these criminal threats for the Subcommittee.

Financial and Mortgage Fraud: From foreclosure frauds to sub-prime scams, mortgage fraud is a serious problem. The FBI continues to develop new approaches and techniques for detecting, investigating, and combating mortgage-related fraud. Through the use of joint agency task forces and working groups, the FBI and its partners work to pinpoint the most egregious offenders and identify emerging trends before they flourish. In FY 2011, these efforts translated into roughly 3,000 pending mortgage fraud investigations – compared to approximately 700 investigations in FY 2005. Nearly 70 percent of FBI's pending investigations involve losses of more than \$1 million. The number of FBI Special Agents investigating mortgage fraud cases has increased from 120 in FY 2007 to 332 Special Agents in FY 2011. The multi-agency task force and working group model serves as a force-multiplier, providing an array of interagency resources and expertise to identify the source of the fraud, as well as finding the most effective way to prosecute each case, particularly in active markets where fraud is widespread.

The FBI and its law enforcement partners also continue to uncover major frauds, insider trading activity, and Ponzi schemes. At the end of FY 2011, the FBI had more than 2,500 active corporate and securities fraud investigations, representing a 47 percent increase since FY 2008. Over the past three years, the FBI has obtained approximately \$23.5 billion in recoveries, fines, and restitutions in such programs, and during FY 2011, the FBI obtained 611 convictions, an historic high. The FBI is pursuing those who commit fraud at every level and is working to ensure that those who played a role in the recent financial crisis are brought to justice.

For FY 2013, the FBI is requesting a program increase totaling \$15 million and 44 positions (40 Special Agents and 4 Forensic Accountants) to further address financial and mortgage fraud at all levels of organizations – both senior executives and lower level employees.

These resources will increase the FBI's ability to combat corporate fraud, securities and commodities fraud, and mortgage fraud, and they will enable the FBI to adapt as new fraud schemes emerge.

Health Care Fraud: The focus on health care fraud is no less important. The federal government spends hundreds of billions of dollars every year to fund Medicare, Medicaid, and other government health care programs. In 2011, the FBI had approximately 2,700 active health care fraud investigations, up approximately 7 percent since 2009. Together with attorneys at the Department of Justice and our partners at the Department of Health and Human Services, the FBI is aggressively pursuing fraud and abuse within our nation's health care system.

The annual Health Care Fraud and Abuse Control Program report showed that the government's health care fraud prevention and enforcement efforts recovered nearly \$4.1 billion in taxpayer dollars in FY 2011. This is the highest annual amount ever recovered from individuals and companies who attempted to defraud taxpayers or who sought payments to which they were not entitled.

Gangs and Violent Crime: Violent crimes and gang activities exact a high toll on victimized individuals and communities. There are approximately 33,000 violent street gangs, motorcycle gangs, and prison gangs with about 1.4 million members who are criminally active in the U.S. today. A number of these gangs are sophisticated and well organized; many use violence to control neighborhoods and boost their illegal money-making activities, which include robbery, drug and gun trafficking, fraud, extortion, and prostitution rings. Gangs do not limit their illegal activities to single jurisdictions or communities. FBI is able to work across such lines and, therefore, brings particular value to the fight against violent crime in big cities and small towns across the Nation. Every day, FBI Special Agents work in partnership with state and local officers and deputies on joint task forces and individual investigations. The FBI also has a surge capacity that can be tapped into during major cases.

FBI joint task forces -- Violent Crime, Violent Gang Safe Streets, and Safe Trails Task Forces -- focus on identifying and targeting major groups operating as criminal enterprises. Much of the Bureau's criminal intelligence comes from our state, local, and tribal law enforcement partners, who know their communities inside and out. Joint task forces benefit from FBI surveillance assets and its sources track these gangs to identify emerging trends. Through these multi-subject and multi-jurisdictional investigations, the FBI concentrates its efforts on high-level groups engaged in patterns of racketeering. This investigative model enables us to target senior gang leadership and to develop enterprise-based prosecutions.

In addition, while the FY 2013 budget proposes to eliminate the National Gang Intelligence Center (NGIC), this will not hinder the FBI's ability to perform the analytical work done there. The FBI will continue to produce intelligence products and threat assessments, which are critical to reducing criminal gang activity in our communities. The FBI will also continue to examine the threat posed to the U.S. by criminal gangs and will focus on sharing intelligence at the field level, where intelligence sharing and coordination between DOJ agencies and state and local partners already exist. For example, our Field Intelligence Groups regularly produce intelligence products covering criminal threats, including gangs. It is through these existing resources that we will continue to produce gang-related intelligence in the absence of NGIC. In fact, the responsibility for the production of that material will happen now at the field

level where gangs operate in neighborhoods, districts and communities. The field offices are the closest to the gang problem, have a unique understanding of the gang problem and are in the best position to share that intelligence.

Violence Along the Southwest Border: The escalating violence associated with drug trafficking in Mexico continues to be a significant issue. In addressing this crime problem, the FBI relies on a multi-faceted approach for collecting and sharing intelligence – an approach made possible and enhanced through the Southwest Intelligence Group, the El Paso Intelligence Center, ODETF Fusion Center, and the Intelligence Community. Guided by intelligence, the FBI and its federal law enforcement partners are working diligently, in coordination with the government of Mexico, to counter violent crime and corruption that facilitates the flow of illicit drugs into the United States. The FBI is also cooperating closely with the government of Mexico in their efforts to break the power of the drug cartels inside the country.

Most recently, the collective efforts of the FBI, the Drug Enforcement Administration and other U.S. and Mexican law enforcement partners resulted in the identification and indictment of 35 leaders, members, and associates of one of the most brutal gangs operating along the U.S.-Mexico border on charges of racketeering, murder, drug offenses, money laundering, and obstruction of justice. Of these 35 subjects, 10 Mexican nationals were specifically charged with the March 2010 murders in Juarez, Mexico, of a U.S. Consulate employee and her husband, along with the husband of another consulate employee.

Organized Crime: Ten years ago, the image of organized crime was of hierarchical organizations, or families, that exerted influence over criminal activities in neighborhoods, cities, or states. That image of organized crime has changed dramatically. Today, international criminal enterprises run multi-national, multi-billion-dollar schemes from start to finish. These criminal enterprises are flat, fluid networks and have global reach. While still engaged in many of the “traditional” organized crime activities of loan-sharking, extortion, and murder, new criminal enterprises are targeting stock market fraud and manipulation, cyber-facilitated bank fraud and embezzlement, identity theft, trafficking of women and children, and other illegal activities. This transformation demands a concentrated effort by the FBI and federal, state, local, and international partners to prevent and combat transnational organized crime.

For example, late last year, an investigation by the FBI and its partners led to the indictment and arrest of over 70 members and associates of an Armenian organized crime ring for their role in nearly \$170 million in health care fraud. This case, which involved more than 160 medical clinics, was the culmination of a national level, multi-agency, intelligence-driven investigation. To date, it remains the largest Medicare fraud scheme ever committed by a single enterprise and criminally charged by the Department of Justice.

The FBI is expanding its focus to include West African and Southeast Asian organized crime groups. The Bureau continues to share intelligence about criminal groups with our partners, and to combine resources and expertise to gain a full understanding of each group. To further these efforts, the FBI participates in the International Organized Crime Intelligence Operations Center. This center serves as the primary coordinating mechanism for the efforts of nine federal law enforcement agencies in combating non-drug transnational organized crime networks.

Crimes Against Children: The FBI remains vigilant in its efforts to remove predators from our communities and to keep our children safe. Ready response teams are stationed across the country to quickly respond to abductions. Investigators bring to this issue the full array of forensic tools such as DNA, trace evidence, impression evidence, and digital forensics. Through globalization, law enforcement also has the ability to quickly share information with partners throughout the world and our outreach programs play an integral role in prevention.

The FBI also has several programs in place to educate both parents and children about the dangers posed by violent predators and to recover missing and endangered children should they be taken. Through our Child Abduction Rapid Deployment teams, Innocence Lost National Initiative, Innocent Images National Initiative, Office of Victim Assistance, and numerous community outreach programs, the FBI and its partners are working to make our world a safer place for our children.

Offsets

The FBI's FY 2013 budget request proposes offsets totaling approximately \$63 million, including program reductions. Proposed offsets, which are expected to result in little if any impact on the missions and responsibilities of the FBI, include: elimination of the National Gang Intelligence Center; reduction of one training day and equipment provided for federal, state and local bomb technicians and the Special Weapons and Tactics (SWAT) and Hostage Rescue Team (HRT) training; reduction of contractor workforce funding supporting national security programs; reductions in funding for permanent change of station transfers, which relocates staff to meet organizational needs and carry out mission requirements; and reducing funding for information technology, facilities, and other administrative initiatives. We will work to sustain our efforts in these program areas and minimize the impact of these proposed reductions.

Conclusion

Responding to this complex and ever-changing threat environment is not new to the FBI; in fact, it is now the norm. The budget proposed for the FBI for FY 2013 seeks to maintain current capabilities and capacities achieved through increases provided in the past, as well as target additional resources to address financial and mortgage fraud. These resources are critical for the FBI to be able to address existing and emerging national security and criminal threats.

Chairman Wolf, Ranking Member Fattah, and members of the Subcommittee, I would like to close by again thanking you for this opportunity to discuss the FBI's priorities and detail the FBI's FY 2013 Budget request. Mr. Chairman, let me again acknowledge the leadership that you and this Subcommittee have provided to the FBI. The transformation the FBI has achieved over the past ten years would not have been possible without your support. Your investments in our workforce, our technology, and our infrastructure make a difference every day at FBI offices in the United States and around the world, and we thank you for that support.

I look forward to any questions you may have.

CYBERSECURITY

Mr. WOLF. I have a large number of questions. What we are going to do is go through the other members, and then we can spend a lot of time on these. Your testimony triggered a couple quick ones, though.

We are going to do a briefing for the members of the subcommittee on cybersecurity. It will be up here—I think your people will cooperate—on March 27th. My feeling is, when I meet with university presidents, they don't know how significant this issue is. Would you consider putting a briefing on for university presidents? I guess the classification level would be up to you to determine. But if we were able to encourage them to come, would you be able to put something on for university presidents?

Mr. MUELLER. Yes, I will tell you that maybe 5, 6, 7 years ago we started an advisory committee of university presidents—

Mr. WOLF. Right.

Mr. MUELLER [continuing]. As I think you are familiar, who come in periodically and are briefed on this issue, as well as other issues that are affecting our universities and colleges. We would be happy to brief you both on that program and whatever additional briefings can be arranged for others, we would be more than happy to discuss the impact on universities and colleges of what is happening in this new cyber arena.

Mr. WOLF. Okay, thank you. I think the head of UVA is on that.

Mr. MUELLER. I am not certain of the current membership.

Mr. WOLF. Okay. We will follow up on that.

Secondly, you talked about the cyber attacks and also the espionage. I don't think we have updated our criminal penalties lately. Lamar Smith has a bill on this.

Would you favor increasing, as I would—I am a cosponsor of this bill—to increase the penalties both for espionage, particularly with regard to China, and also with regard to cyber?

Mr. MUELLER. Absolutely. Yes.

We tend to focus on protecting our databases, protecting our infrastructure, which is absolutely an appropriate focus, but we should not forget that you want to identify these individuals who are responsible for these crimes, investigate them, prosecute them, and put them in jail for a substantial period of time. It is only with doing that will we have the penalties that will deter others from undertaking the same activity.

Mr. WOLF. Okay. Because I notice that some of the penalties with regard to espionage with regard to China have been very, very weak and they have been varied across country. But I appreciate that.

NATIONAL SECURITY PROGRAMS

Director Mueller, this is the first FBI budget request in a post-9/11 era that does not seek any increases in the national security program areas. Is that a result of the tough spending climate, or does it reflect that the FBI has reached its desired end-state levels in these programs and it is simply a matter of requesting the funds necessary to keep the current capabilities operational?

Mr. MUELLER. I think it is principally attributable to what you outlined at the outset, which is the budget climate now. When we face the budget constraints we now face, then we have to prioritize. That is what we are doing, prioritizing the money that is given to us.

But that in no way means that we have reached our end state, particularly when it comes to developing our intelligence capacity and developing our capacity to address cyber crime as it grows in the years ahead.

Mr. WOLF. Well, that is good to know, because a small increase in certain areas may look like an increase, but when you look at the impact to our Nation of 9/11, both economically but also with regard to the personal loss of almost 3,000 people, the very thought that we could deny the Bureau or some other agency a small amount of money whereby they could prevent something. I think we have to be careful that we don't say we are going to cut this thing back to the bone, and in the process we allow an attack like 9/11 to take place. Almost 200 people from my district were killed in the attack on the Pentagon. I know what you people have done. So I would not want to see the committee say, we can save \$1 million or \$2 million here and I think we should do that.

Frankly—not to get involved in politics, but I will say this—I think we are going to have to modify and reform the entitlements in this country and close these tax loopholes. GE paid no taxes in 2010. They were one of the largest taxpayers in China. So if we want to solve this economic thing, we have got to reform the entitlements—Social Security, Medicare, Medicaid—and we have to close these tax loopholes. But I worry that when you start arguing over domestic discretionary spending with regard to a million here with regard to the FBI, we may end up inviting another attack. So, you know, I appreciate your comments.

Preventing terrorism is very clearly stated as the Justice Department's top strategy. Yet, if you look at what has been increased in the fiscal year 2013 budget both department-wide and in the FBI, it is not national security. There is a department-wide increase for financial fraud, of which the FBI has a piece. There are significant increases in prisons and detentions and a smattering of other minor increases.

Were there any high-priority—and I don't want to get you across the breakers with OMB—but were there any high-priority counter-terrorism or intelligence increases that were considered but were not included in the budget request?

Mr. MUELLER. Well, you actually are more familiar with this process than perhaps I am because you have been involved in the process longer than I have. But as I am sure, Mr. Chairman, you know, that in developing the budget there are a number of things that are pushed forward, and there are discussions had at the Justice Department level and OMB level every year on the platter.

I will tell you that we haven't lost our desire to increase in areas such as surveillance, which is tremendously important, and training when it comes to cyber and cyber forensics, but we have gotten resources in the last several years in those particular areas. We are going to continue to need them in the future. My expectation is that the budget environment is probably not going to change that

much as we go down the road, but I think you will see some of these areas that we have in the last several years pushed will again be pushed in the future.

Mr. WOLF. Two more questions, then I will go to Mr. Schiff.

IMPACT OF UNOBLIGATED BALANCE RESCISSION

The biggest reduction in your budget is the proposed rescission of \$162 million from prior-year balances in your S&E account. I understand this funding is currently allocated to an assortment of activities. What specific FBI activities would be impacted by this rescission?

Mr. MUELLER. We look at three areas.

The first is funding allocated to protect our internal cyber infrastructure against attack—the type of WikiLeaks phenomenon where you either have an insider or somebody from the outside who seeks to extract or exfiltrate our data. Pieces of that will be impacted to the tune of approximately \$37 million.

Secondly, we have the process of evaluating IEDs that have been discovered in Iraq and now Afghanistan. We take those IEDs and process them through our laboratory for fingerprints, for DNA, for the designs, and we have a backlog. Our ability to get through that backlog will be impacted by that rescission.

And, finally, as I believe the committee knows, we have for a number of years been seeking to consolidate our records and make them more readily available both to us in terms of the ability to exchange information with our brothers and sisters in the intelligence community and law enforcement community, and to consolidate records from 400 locations in a records center. The balance of the funds would be going to the development of that records center.

Again, I might point out there, the development of the records center is not only important in terms of our ability to obtain information quickly because part of it results in the digitization of the records, but it also enables us to be more responsive when it comes to name checks or be responsive to FOIA requests as well.

So it is not just putting the records in one place, but for us, as an intelligence organization, it substantially increases our ability to do our job if we were able to consolidate those records from 400 separate locations around the world.

Mr. WOLF. Four hundred, wow.

CRITICAL INCIDENT RESPONSE GROUP OFFSET

The last question then here, this cycle, is your budget also cuts \$3.4 million from the Critical Incident Response Group. This is the elite group of agents who are experts in crisis management, hostage rescue, hazardous devices response.

The justification says only that this cut will be taken through training and equipment. What percentage cut does this represent? And will there be any impact on the operation with this reduction?

Mr. MUELLER. Well, there would be an impact, but we would try to cover that elsewhere in the budget process. I would have to get back to you on the percentage figure.

Mr. WOLF. Okay.

[CLERK'S NOTE.—Information provided subsequently by the Bureau indicates that the proposed offset will reduce the Critical Inci-

dent Response Group's training and equipment budget related to the Hazardous Devices School, Special Agent Bomb Technicians, SWAT, and Hostage Reserve Team by 24 percent.]

If I can skip—I will go to Mr. Serrano. He was here first. No, I will go to—since you came in first, I think we will do it that way.

And so, Mr. Serrano.

Mr. SERRANO. Thank you, Mr. Chairman.

And welcome, Mr. Director. Nice to see you.

NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS)

I understand that there continue to be difficulties keeping the National Instant Criminal Background Check System up to date, that States and other Federal agencies are not all providing the necessary data in a timely fashion.

Are you working with your partners on ways to improve compliance? And do you have the resources to ensure that this is fully functional so that gun sellers have an accurate list of prohibited buyers when they sell weapons to people? I mean, there seems to be a concern that this is not as up to date as it should be.

Mr. MUELLER. I will check on that. I have not heard about that concern. I had thought we were up to date in terms of the information that we have received. If it is a delay in information getting to us, then I will explore that and see how we can reduce that.

But in terms of records checks, we had 2, 3 years ago a substantial increase and we did have a backlog, but we had pretty much reduced that.

Mr. SERRANO. Okay. I would appreciate that, because I have heard that that is a real concern. And we should—

Mr. MUELLER. We will check on that and get back to you, sir.

Mr. SERRANO. Thank you.

FINANCIAL FRAUD ENHANCEMENT

Also, in your testimony I am pleased to see that in your request for 2013 you are asking for an additional \$50 million to add 40 agents and 4 accountants to address financial and mortgage fraud. Do you believe that this will adequately address your needs in this area?

And I am also interested to hear how your work in this area has been affected by the addition of the CFPB. How are you working with the new agency, and how has it affected your relationship with the SEC?

Now, please understand that on the subcommittee that I am ranking member on there is that whole thing between the SEC and the new consumer board and who is going to do what and what are the new regulations, and we are all trying to figure out how it all fits. So I think the proper question to ask you is, how does it fit with you?

Mr. MUELLER. I think it is too early to tell, because we have had a longstanding relationship with the SEC. In fact, over the last 2 or 3 years we have had breakthroughs in terms of our working together with the same document databases so that we didn't have, in a particular investigation, a separate database, the SEC had a database of documents, and then the prosecutors have yet another

database. So the efficiencies of our investigations have improved substantially with the SEC over the last few years.

I would have to check, because I have not asked this specific question, but I would imagine that we are at the starting gates in terms of developing a relationship with the new agency. And as the new agency sorts out its relationships with other regulatory agencies, we will hope to develop the same type of relationship that we have developed over a period of time with the SEC.

INVESTIGATING TERRORISM VS. TRADITIONAL CRIMES

Mr. SERRANO. Thank you.

A question that I asked you quite a while ago, and it is one that still is on the minds of some folks: During the time that I have been on this subcommittee and the time I was off and came back, there was a big emphasis since September 11th with the FBI to go after terrorism, and we all supported that. We supported it with dollars, we supported it in spirit. We were all on board with that and continue to be on board.

One of my concerns, then, that you always address was the whole issue of how do we deal with other crimes in society. You know, were we paying attention as much as we should to white-collar crime, as we call it, and so on.

Can you tell us what you see happening there? I mean, is the emphasis on the fight against terrorism taking away from the emphasis on the other issues?

Mr. MUELLER. Well, we have such a broad range of crimes to investigate within our jurisdiction that we have to prioritize.

On the national security side, it is counterterrorism, espionage, and cyber. Those are the three top priorities, and every special agent in charge understands that those have to be addressed first.

On the criminal side, we prioritize with public corruption and civil rights, because if we did not focus on that, quite often those particular investigations would not be undertaken; and then transnational, international organized crime, because it cuts across the jurisdictions of local departments and the like; white-collar crime and violent crime.

We have prioritized—every year we go back and look at those priorities and determine whether or not they should change, and every year we come to the conclusion that currently those are the priorities.

I would say that we have more cases involving public corruption now than we did back in 2001 because we prioritized. We make certain that any civil rights complaint is quickly investigated and resolved. We have had substantial success in addressing various organized criminal groups within the United States because it is a priority.

Then, when it comes to white-collar crime, when you have a mortgage fraud crisis or a securities fraud crisis, we put the persons on it to get us through. If you will recall, back in 2002 you had Enron, HealthSouth, and WorldCom. We had a number of cases that we had to prioritize, and we did so. Right now, mortgage fraud, which is a result of what happened in 2008, is a priority.

So we prioritize. Are there things we are not doing as much of? Yes, the bank robberies, fugitives, and other things. But we have had to prioritize to maximize our impact on the particular threats.

Mr. SERRANO. Good.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you.

Mr. Bonner.

Mr. BONNER. Thank you, Mr. Chairman.

Director, it is great to have you back here. Thank you again for your service.

The fact that this panel is not full of Members is not indicative of the importance of this hearing. It is that the Republicans are having a conference with all of our Members. We have other committee members that are on the Democrat side that have other committee meetings, as well. So please don't take offense at the fact that we are not all here to listen to you because not only—

Mr. MUELLER. Not to worry.

Mr. WOLF. He might be just as glad.

Mr. BONNER. He might be just as glad.

VIOLENT CRIMES

Last week, we had the Attorney General sitting at that table before this subcommittee. And I am not going to try to get you at odds with the Attorney General, but he was talking about how crime is down, and he was giving the administration a pat on the back for that. And, obviously, when things go well, you take credit for it, and when things don't go well, you don't want any of the blame for it.

But here is my question. Cyber attacks are a new threat that a few years ago we didn't even know existed. Clearly, the type of—just in your testimony today, healthcare fraud, certainly the threat of terrorism here on these shores since 9/11. What the FBI under your leadership has done to help keep us safe is something that we owe a profound debt of gratitude to.

Ponzi schemes, meth labs.

We had a—I hate to even say this in public, but we had a man and woman in my district who were arrested last week for cooking meth next to the crib of an 8-month-old child that they had violently sexually abused. Officer Steven Green in Mobile, Alabama, where I am from, was killed as he was taking someone who had been arrested at a Dollar General store. Another officer, just the other day, was shot who came off-duty to try to go in and thwart a robbery at a local grocery store.

So my question to you: Are we really safer, or do we just have different threats today that FBI and local and State law enforcement are working on in addressing that we didn't have 15 or 20 years ago?

Mr. MUELLER. Well, I think the statistics, particularly the ones that we push out, show that generally violent crime as well as property crimes have gone down over the last several years, anywhere from 2 to 4 to 5 to almost 6 percent.

I don't think there is any person or entity that can conclusively identify the contributing factors to that. Quite obviously, it would be increases in capabilities in policing. Community policing and

what a number of chiefs have done to focus on crime hot spots I believe have contributed to that.

But by the same token, I am sure the Attorney General understands and is tremendously concerned about—and I know because we have talked and met with police chiefs, the number of police officer killings, which have been up over the last 2 years. We are tremendously concerned about that and looking to try to understand that phenomenon but are also working to do whatever we can to contribute to the protection of the officers on the streets, whether it be ours or state and local law enforcement.

You also see in certain towns, particularly many of the larger cities, that violent crime has gone down, but that is not true in all. And there are a combination of factors that contribute. It is not necessarily just the police department, but contributing factors in particular communities.

We get some solace from the fact that violent crime has gone down, but we cannot take our eye off those figures and off the necessity to continuously press to make certain that it stays down and we drive it down even more.

GANG VIOLENCE

Mr. BONNER. Well, as a follow-up, in your testimony you said that there were more than 33,000 gangs and more than 1.4 million members of those gangs. Clearly, that has to be a real concern for all levels of law enforcement but especially the FBI.

What can you tell us, what can you tell the American people, the taxpayers who pay all of our salaries, that they can do to be more aware and more involved in helping law enforcement, again, at every level but especially the FBI, in identifying gangs and the potential violence that comes from that?

Mr. MUELLER. Let me talk just for a second about the growth in gangs and what it has represented in the last several years.

It used to be that gangs were somewhat localized within the United States, but that has changed over the last 8, 9, 10 years. You have the MS-13, and 18th Street gangs coming out of Los Angeles who have spread across the United States and are found in a number of countries in the hemisphere. MS-13, an El Salvadoran gang in Los Angeles, is in a number of your communities at this point but also in Honduras, Guatemala, Mexico, as well as El Salvador.

One of the reasons that that is a priority for us is because we have the jurisdiction to do those investigations and work with our counterparts in those particular countries to address gang members who go in and out of the United States daily. So, whereas it used to be that the focus would be on a locality to address a particular gang, or several localities, now it is global.

For instance, we have a fingerprint initiative down in El Salvador where we exchange database information with our counterparts. We have to do that. For the citizens and the public, it is, whether anonymously or otherwise, giving us information that will identify the most violent individuals in these gangs—the shooters, the ones who are very willing, with no restraint, to kill another person. You give us that information, whether it be the local police or the FBI, and we will run with it.

I am a firm believer in task forces; that we cannot do it alone. And so, consequently, much of the funding I have requested over the years is to support task forces, where we have our Federal agencies as well as State and local law enforcement as participants.

COMPARISON OF CYBER AND SOUTHWEST BORDER THREATS

Mr. BONNER. Two more quick questions.

With the leadership of Chairman Wolf, Chairman Rogers of the full committee, Mr. Dicks, the ranking member, and others, a lot has been discussed recently about cyber threats, cybersecurity, the concerns about China, among others, being one of the leading nations that we have to worry about in terms of stealing technology and trade secrets.

Which do you think—and maybe this is not a fair question; you can tell me. But which do you think is a more direct threat to our way of life: the cyber threats and the threat of foreign countries stealing our secrets and technology, or—the State of Texas yesterday, I think for the third year in a row, is advising spring breakers not to go across the border and vacation in Mexico because they say it is not safe—our southern border and the issues we are facing there? Or are they both—different types of threats but both threats to our way of life?

Mr. MUELLER. Well, certainly, they are both threats. Terrorism is a threat, and, as I have said and will repeat, for the Bureau the threat of terrorism will be the number-one priority for the foreseeable future. If a terrorist is successful, people die. And one has to prevent that from happening.

Certainly, a long-term threat is by nation-states who are finding new and ingenious ways to exfiltrate information that will give them a jump ahead in terms of developing, on the one hand, new technology for any future conflict or, on the other hand, enabling them to disable our technology in a time of war. That is a very substantial threat of a different order.

The violence in Mexico, because it entails the death of persons, is an immediate and very dangerous threat. One of our concerns is that it does not spread over the border.

So, I would have to say those where there is a loss of life and more immediate—people tend to think of that as the immediate threat. But down the road, if a country steals those secrets that will enable that country to overwhelm us on the field of battle someplace, that is something that is a threat and ultimately may be a more serious threat.

Mr. BONNER. Well, my last comment is really not a question, it is just a favor. You thanked Congress and the American people on behalf of the 34,000 men and women that you represent for the funding that has been provided to you, especially since 9/11. If you would convey the message back from all of us to the men and women in the field, they are certainly on the front lines and risking their lives to keep our country safe, and I know I speak for all of our Members of Congress, we appreciate their work every day.

Mr. MUELLER. Thank you, sir. I will pass that on.

Mr. BONNER. Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Bonner.

Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman.
Director, welcome back.

Mr. MUELLER. Thank you.

Mr. SCHIFF. It is hard for me to believe that you have been at this for 10 years now. I am sure it is hard for you to believe.

Mr. MUELLER. It is.

Mr. SCHIFF. You have done just an extraordinary job. We have been very lucky to have you as long as we have had you.

FAMILIAL DNA

I wanted to follow up with our conversation about familial DNA. As you know, I have a deep interest in extended use of DNA in criminal investigations. It has tremendous power to take violent people off the street.

We had success with our familial DNA efforts in California in apprehending the suspect in the Grim Sleeper case. We were only able to bring it together because of the extraordinary technique of being able to use familial DNA.

I have introduced legislation that would authorize familial searching of NDIS, with protections for privacy and limiting the situations under which familial searches can be used for the most heinous violence crimes. I worked with the committee to obtain report language in the CJS conference report last year encouraging the FBI to undertake activities to facilitate familial DNA searches of the Combined DNA Index System database of convicted offenders.

Last year, you expressed support for familial search. The Attorney General, last week, said familial search is an idea whose time has come. And I wanted to follow up to see if the Bureau has taken steps toward implementing a familial search procedure for NDIS and whether you see any reason not to move forward with that.

And if you believe we need authorizing legislation, I wanted to ask if you would work with our staff on that legislation that we have introduced.

Mr. MUELLER. Yes, as I have indicated before, I am a supporter of using familial DNA and see the results, particularly in the U.K. but also in the instances it has been used here.

Legislation will be helpful, but it is complicated in the sense that developing a software capability that could be used across various States is a challenge. Putting together the appropriate algorithms to be utilized in this is a challenge. And, finally, the funding of it is also a challenge.

All of that goes to say that I have had several meetings on it in which I have explored what is the framework for going forward. One of the areas that I want to explore is to put it in the context of our advisory board that advises CJIS, which is an advisory board, as I think you are aware, of State and local law enforcement, so that as we develop the capability, we have the input from State and local law enforcement as well.

So what I am looking for is a way forward in terms of what kind of software we need and what kind of infrastructure we need in order to be able to do that across and beyond the four or five States that currently have that. My hope is that in the next several

months we will be able to come back to you with some sort of framework.

I had thought, in my somewhat naïve way, that it would be fairly easily put together. I am fairly convinced now it is not as easy as I originally thought. But we ought to be taking the leadership role on this and putting together a program to get us to the end state where you want us to be.

Mr. SCHIFF. Well, thank you. And I would love to meet with your staff and see if we can help with any of the challenges you are encountering.

What we understand from California is that it really wasn't that difficult in terms of their software and it wasn't that expensive. Now, everything, of course, is easier in the Golden State, except our budget. But I would love to follow up with you and see if—

Mr. MUELLER. I would be happy to follow up with you on that.

NATIONAL DEFENSE AUTHORIZATION ACT

Mr. SCHIFF. Director Mueller, in December, when the Congress debated the National Defense Authorization Act, you expressed some concerns about provisions dealing with military custody for certain classes of terrorism suspects. Those were concerns that I shared. To summarize, I think you felt that there was a lack of clarity that could inhibit interrogations of suspects and possibly hinder investigations by creating potential turf wars between law enforcement and the military.

On February 28th, the President issued a policy directive regarding the NDAA, specifically Section 1022. The President's directive implementing Section 1022 reads the law to deal with a narrow class of suspects: non-U.S. citizens closely linked to al-Qaeda who were planning on carrying out an attack against the U.S. or coalition partners.

The President's directive also notes that Section 1022 of the NDAA specifically authorized the President to waive the military custody requirement at any time when doing so serves U.S. national security interests, and makes broad use of that authority to make civilian custody the default for many types of cases. And I think the President was right to make this clarification.

Do you feel that the President's policy directive provides sufficient clarity to the FBI regarding how to deal with terrorism suspects? Do you have remaining concerns that this section of the NDAA will interfere with your investigations in any way?

Mr. MUELLER. I had two concerns at the outset. One was the impact of that section in terms of our authorities. That was remedied by the statute itself, with the specific provision about the continuation of our authorities regardless of what happened. And then the second area of concern I had, as you point out, was what happens at time of arrest. The provisions in the Presidential order have resolved those concerns.

Of course, we have to see how it operates in practice. But, as you will see, we are given authority to maintain that investigation, maintain that interrogation, and maintain the investigation of others who may not fit into the category. There is substantial deference given to our ongoing investigation at the time in which the decision initially will be addressed.

MEGAUPLOAD INTELLECTUAL PROPERTY ENFORCEMENT

Mr. SCHIFF. Let me turn to one last area. I want to commend you and the Bureau for the January indictment of the New Zealand-based cyber locker Megaupload. The indictment of Megaupload's founder and several of his employees on charges of criminal copyright infringement and racketeering is an example of a complicated criminal investigation yielding lasting and meaningful results.

Megaupload was not a small player. At one time, it was the thirteenth most visited site on the Internet, at least by one measure. It got that enormous popularity by unscrupulously hosting copyrighted content illegally, and, in doing so, it earned millions of dollars in advertising profits and subscription fees. It is clear from the indictment that the owners knew full well that they were in the piracy business and hoped to do the bare minimum necessary to avoid prosecution.

This investigation and indictment are the direct result of the work of FBI agents and AUSAs that have been dedicated by the Department with the support of this committee to IP enforcement. We are seeing the results of this investigation resonating, with other cyber lockers with questionable business practices voluntarily shutting down operations rather than face investigation.

Can you share with us some of the challenges of dealing with on-line entities that are actively profiting from piracy, particularly those that set up operations overseas specifically to avoid U.S. jurisdiction? And what happens when a site is based in a country that, unlike New Zealand in the case of Megaupload, refuses to cooperate with U.S. law enforcement?

Mr. MUELLER. Well, taking the last point first, quite obviously, if a country refuses to cooperate, that shuts the door on any investigation in a particular country.

What is significant about the Megaupload case and the case against Anonymous and LulzSec where arrests were made yesterday, and Coreflood botnets, which was a takedown we had several months ago, the essence was the ability to work with our counterparts overseas, which is why we have strategically placed agents with our counterparts in countries like Romania, Ukraine, Estonia, and the like, where much of the activity takes place. Our ability to work internationally is absolutely essential in order to address the cyber arena.

NATIONAL ACADEMY

One of the things that often is overlooked is that the development of our relationships often is in large part attributable to the National Academy, where we bring in State and local law enforcement for a 10-week course on, it can be terrorism, but it is the latest issues. We also bring in, when we do that, middle-level police officers from countries around the world. Out of every class of 250, there will be 20-30 individuals from around the world.

And then when you have a case in a New Zealand or a Ukraine or even a France or a Morocco, you have persons there who have gone through the FBI Academy whom you can call up. Since you know they have had the 10 weeks of training, you know they have

already gone through some sort of security check. It gives us a network of people around the world.

I am saying this to put in a plug for the National Academy. It is one of the gems that has been in the Bureau for a period of time but will be even more important in the future when so much of our work is international work. One of the things I do want to do in the next year to year and a half, is enhance the capabilities of the National Academy to train our counterparts from police departments overseas as we continue to train State and local law enforcement.

Our ability to have those contacts overseas is instrumental in successfully doing a case such as Megaupload or Coreflood botnet where you saw yesterday as the arrests were made in Ireland and U.K., and they were coordinated here because we have those contacts that have been developed through our training process.

Mr. SCHIFF. Thank you, Mr. Director.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you.

Mr. Yoder.

SEQUESTRATION/PRIORITIZATION OF REDUCTIONS

Mr. YODER. Thank you, Mr. Chairman.

And thank you, Director, for being here today. And, certainly, we appreciate your tenure. My understanding, you are staying on longer than maybe originally intended, and we appreciate the fact that you are willing to continue to serve and do your very best for the American people, who expect us in this country to provide top-notch law enforcement.

We know that, given some of the testimony you have already given and some of the challenges our country is facing, you have a diverse agenda of items that cause you to have to juggle a lot of balls. As we work in this committee and across Congress, one of the biggest challenges we face is how to fund all of the priorities that the American people want amongst limited resources. And it is a constant challenge for any governmental entity, and certainly cities, States, counties, the whole thing.

And the Federal Government has done a particularly poor job of managing its resources. We now have a \$16 trillion national debt, we are running trillion-dollar deficits every year. And the Chairman spoke a little bit about some of those causes, but we also need to note that spending on our domestic programs has gone up dramatically in recent years.

And so, any time we have an opportunity to sit down with someone who is responsible for critical functions of the Federal Government, we would like to talk about what our priorities are, how we can better attune our financial resources. And so I want to just engage you a little bit in a discussion of trying to understand—I am new to the committee, new to the Congress. And the national debt is a big concern of mine, and so we are trying to find ways to cut spending in all areas.

What in terms of the agency's efforts administratively are we doing to reduce expenditures?

And, certainly, when it comes to making our priorities in Congress, I think national defense, criminal justice are top priorities.

And so we have to decide what is the high priority and the low priority. What sort of process have you gone under, sir, as you have attempted to say—we may have limited resources in future, and we know we are looking at sequestration and potentially some deeper cuts for all agencies. To the extent that any of those cuts might affect the FBI, sir, what sort of process have you gone through to determine what is your top priority and, if you had to make reductions, where those reductions would come from first?

And, also, I note that your agency is asking for a \$114 million increase, which it certainly is challenging to increase any budgets right now. And if we went the other direction, what sort of things would the FBI look at reducing first?

Mr. MUELLER. Well, as I think I expressed earlier, we have the programs relating to particular threats, such as counterterrorism, espionage, and cyber on the national security front, and then the four or five that I listed on the criminal side of the house. To the extent that we get caught up, we are not doing as much in terms of addressing violent crime. We will not get to those mortgage fraud cases we want to get to.

But going to the essence of your question of what are we doing to husband our resources, one of the things we did maybe 6, 7, 8 years ago is, as opposed to having the Bureau's management run by agents as had been traditionally the case, we started a program where we bring in recent graduates from business schools who start at sort of the bottom rung. We brought in about 20 or 30 of those, and we assign them to particular projects throughout the Bureau. The purpose of this was to streamline our operations. Over the years we have saved millions of dollars on simple things such as rental car contracts, wireless contracts, as well as how we handle our vehicles, and the various administrative functions of the Bureau, consolidating where we can consolidate.

We are currently looking at consolidating offices, because we have 56 field offices and 400 resident agencies around the country. We have gone through a process to determine where we can make savings there.

Another factor is in the area of utilizing contractors, which can be far more expensive. We have a program to diminish the number of contractors and bring them in house, because it is a lot cheaper. So at the same time that we are prioritizing what we are doing in terms of making the public safe, we are also utilizing this cadre of individuals with a particular focus on identifying ways that we can save money in the Bureau. They have done a remarkable, remarkable job. Many of them now are moving to the upper ranks of the Bureau with that business acumen coming from outside. Many of them have had experience before they ever went to business school in businesses, and that has made a substantial difference.

Mr. YODER. I appreciate that process and effort in that regard.

If we were to make additional reductions, what approach would you take? Would you use an across-the-board effort? Would you target it specifically at administration? I guess I just want to get a sense of, as we begin to look at ways to constrain budgets in every department, I think it is incumbent upon us to sort of go through this interchange with agency heads, directors, et cetera, about how

each agency would look at reductions and what approach you would take.

Mr. MUELLER. I certainly would not do it across the board. My belief is you have to prioritize, and there are things that we just would not do. But if we do not do them, there is an enhanced risk.

An example that we talked about earlier was TEDAC process, where we take IEDs from Iraq and Afghanistan, and run them through our laboratories, and send the information back to our soldiers on the field. We have a backlog. I have resources allocated to address that backlog. If we are cut, I cannot do that backlog, and that enhances the risk that we will not have a fingerprint of an individual on an IED, and that individual may get into Europe or may get into the United States because we have not addressed that backlog. But that is less important than making certain that we follow every lead on every potential terrorist in the United States. So I have to prioritize, but with the prioritization comes an enhanced risk.

Mr. YODER. And in terms of one of the issues that certainly came before I was in Congress related to September 11 and the concern about the coordination of various intelligence agencies and the Department of Homeland Security was developed, and as we have headed down that road, to the extent we can discuss that, in terms of communication we have obviously grown the amount of individuals. Have we seen the types of things that we wanted to see from that over the years? And has it allowed the administration to reduce expenditures in areas because of duplication with the Department? And how does that all work?

Mr. MUELLER. Well, I would have to leave the description of what is occurring in DHS in the hands of DHS.

Mr. YODER. Sure. In terms of how it affected your agency, sir.

Mr. MUELLER. I will tell you that the PATRIOT Act and breaking down the walls between ourselves and the Intelligence Community has reaped substantial benefits. I am not certain in terms of financial. But I will tell you the sharing of information now is instantaneous between ourselves and the CIA and NSA.

The development of NCTC, National Counterterrorism Center, has been tremendously effective. It is one of the more effective tools that have come out in the wake of September 11 in terms of giving an overarching view of terrorism, because terrorism is not limited by borders. The threat to us may come from Pakistan, Somalia, Yemen and the like, and you need that picture.

So, first of all, the exchange of information is as it should be, and it will continue, and needs to continue, in the cyber arena as we establish it and continue in the counterterrorism arena. And there are certain aspects certainly of the mechanisms and institutions that were put into place in the wake of September 11th that have been invaluable and need to continue as we address the cyber arena.

SENTINEL

Mr. YODER. I appreciate that. And then as we are looking at specific areas we can cut, certainly one area I know you are aware of that has come under scrutiny with the FBI, and you spoke about it earlier, is the Sentinel project, and some of the efforts to stream-

line the recordkeeping. And we had the inspector general in last year, who was fairly critical of the cost overruns, and tried to get to the heart of where that was from. And my recollection of that conversation with the inspector general is he laid much of that concern at the feet of the FBI. My initial thought was, okay, this is a third party that is not coming in under budget, and, you know, we need to change third parties. His response, my recollection, was it was more FBI making later decisions, making changes towards the end of projects that were already run.

That may be a blame game. But I guess what are your thoughts on what we learned from that, how it is going forward? And certainly as we are trying to cut administrative costs, you know, overruns in the hundreds of millions certainly is not something that enhances safety or helps solve the debt, which are two of our goals here in this room today.

Mr. MUELLER. The Sentinel project was a four-phase project, started maybe 4 or 5 years ago, and the cap on it, I think, is \$451 million. We got to phase two with the contractor, and what had been produced by the contractor was not satisfactory. We cut it off and restructured to take much of it in house.

There are three aspects to the contract. One is the timeframe of getting it completed, where we push it out; second is the funding; and third, to make it work. I have emphasized, number one, making certain that it works when it goes out. Our expectation is this will occur this summer or fall. And as we speak today, it is being tested in three of our offices around the country. So, I am fairly confident that it will work.

Secondly is the budget. We are still under budget. And we are under budget because we restructured the contract to focus on what should be accomplished and make certain that we tried to accomplish it under budget. We are currently under budget. Now it has been delayed because I focused on the other two aspects. I wanted to make certain it works, and I wanted to keep it under budget. So it is delayed until I get it out there and I get it out under budget, or close to budget. We may be just over. Right now we are under budget.

Mr. YODER. Well, and I certainly appreciate that, because the concern, obviously, is as you go over budget, it is hard to explain to our constituents. It is hard to explain that when we are making tough decisions and we have projects going over budget. It appears from the things I am reading that the FBI has taken note of the concerns and, as you are stating, has made changes to the project to put it in a more positive position. So that seems to be moving in the right direction.

Mr. MUELLER. If you want me to talk for a while, I could talk about the procurement process in the Federal Government and the constraints that it has on our ability to make projects and modify projects and the like.

Mr. YODER. Let me actually, Mr. Chairman, if one may for one more minute here, I noted in my notes here somewhere that the FBI's authorization has not occurred for some time period in Congress in terms of the authorizing committee; that through the financial process we have been doing it through appropriations. And that may be incorrect, I guess.

What can Congress do to give better guidance to the FBI? And certainly we need to always continue to try to keep our house in order. It is easy for us to sort of criticize your work. How can we be more clear or more direct about prioritization, or remove obstacles that we place in your way, such as the procurement process or other things, that would create better opportunities for you to better manage your department?

Mr. MUELLER. Well, the procurement process is larger than probably any of this in terms of getting things in this day and age moving more quickly than we would like. What this committee has done is to visit the Terrorist Screening Center, or the National Cyber Investigative Joint Task Force, and by visiting these entities, you have some idea of what we are doing.

To the extent that one is interested in familial DNA, it is very beneficial and useful for us to have that interest, and it makes us come back and be responsive in terms of briefings and have a path forward. So the process of working together, understanding your focus in terms of your constituency, but your understanding of what we are trying to do to address the threats, I think, is a valuable exchange, but also to understand that we are different. We are not like every other agency. The decisions we make affect persons' daily lives. But some of them, not all of them, quite obviously, relate to life and death as well. So we are different than other agencies. And understanding that difference and giving us the budget support, recognizing that difference, is important.

I want to say that we are on the law enforcement side, but we are now an intelligence and law enforcement agency and should be perceived as such in the same way that the CIA, NSA, or DOD is perceived as the kind of agency that protects the United States. We do the same thing. When it comes to decisions, I would hope that people would keep that in mind. When we do not do something, there is a certain risk that is undertaken, and understanding that risk in the budget process, I think, is important.

Mr. YODER. Thank you, Director.

Thank you, Mr. Chairman.

TERRORIST SCREENING CENTER/CONTRACTOR REDUCTION

Mr. WOLF. The Terrorist Screening Center is responsible for maintaining the integrity of known terrorist identities data for the Federal terror watch list. I think we can agree that it is a pretty important function. I was out there last week to visit them. What work being done at the center would be terminated under this proposal of the change with regards to the budget that the administration has submitted? And where would that work then be taken up? Who would take up whatever would be reduced out there?

Mr. MUELLER. It was a question as to what—

Mr. WOLF. There is a reduction in the budget of \$7 million from selected national security activities. They are proposing to shrink the contractor workforce at the Counterintelligence Strategic Partnership Program, the Terrorist Screening Center. What would be terminated? What roles, what activity would be eliminated based on this?

Mr. MUELLER. Would you just give me a second?

Mr. WOLF. Sure.

Mr. MUELLER. That particular reduction is something we are going to have to cover by bringing that which is being done by contractors now in house. Our expectation is we will be able to cover that.

Mr. WOLF. And you will miss nothing with a result of that?

I would urge Members, if they get a chance, to go out and see the center. It is a place where, based on the Christmas Day bomber, you know, the activity, and had the center not been there—it is like one of those things that you can say if the center had not been there, was not there, what might take place in this country is so devastating. But yet you will never know what never happened because the center is there. Had the Christmas Day bomber been successful, had there been—had the Times Square bomber been successful.

So I guess I would urge every Member—and we are going to bring the cyber briefing up here on the Hill—but I think it would be helpful to go out and visit the center. And also I think it would be helpful for everybody to go out and visit the counterterrorism center so you can see stovepipes have been broken down. There is communication between them all.

So you think there will be no loss of any—

Mr. MUELLER. We will have to cover because of the prioritization we give it.

Mr. WOLF. Okay. Have you ever considered, since you have everybody there together, the possibility of using the same process to screen for foreign war criminals, human rights violators, and major organized crime? In your view, would it be feasible to add these data sets to the TSC? Because once someone gets in, organized crime, Russian Mafia, criminal activity if somebody has been involved in atrocities whether it be in the former Yugoslavia, or Sierra Leone, or Liberia, it is very difficult to get them out. And you have organized crime people who are committing crimes, that are killing Americans. Have you ever thought of using that?

Like Charles Taylor's son, who was involved in atrocities in Liberia and Sierra Leone, got into the country. There is a unit in the Justice Department, as you know, that tracks Nazi war criminals, some of whom got into the country. Have you thought of using this, which was a very impressive process, to see if we could prohibit people like that from coming into the country? And like when there is a TACA flight coming out of San Salvador loaded with a couple MS-13 guys that are going to come up and cut the hands off of people in the northern Virginia, or the L.A. area, or wherever, would it not be better to keep the guy in San Salvador and off the TACA flight rather than coming into Dulles airport and then coming in and doing what they are doing? I think we could eliminate a lot. So have you looked at that from doing that?

Mr. MUELLER. Well, yes, it would be good to keep them out. And the focus has been terrorism for a variety of reasons, but that does not mean we should not look and see if there are possibilities of using other data sets.

I know there are other data sets, for instance State has one, which would have that kind of information that would preclude somebody from getting a visa or a document that would enable them to come into the United States. I would have to go back and

look at how that data set is currently being used, and then look at it from the perspective of how we can enhance the Terrorist Screening Center to perhaps address those objectives, and we are willing to do that.

Mr. WOLF. Okay. If you would look at that and let us know if you need new legislation, because there are known war criminals who have come into the Nation, come into the country, and they are very difficult to remove them. If we could keep them out.

Also I understand the TSC has never been formally authorized. Is this something you are seeking a remedy to? Has there been any draft legislation up here to authorize it?

Mr. MUELLER. I am not familiar. I know it was established, you know, 6, 7, 8 years ago, and it has worked very well.

Mr. WOLF. I think it was done by Executive Order, though, wasn't it?

Mr. MUELLER. It was. An Executive Order by President Bush.

Mr. WOLF. I was there when he did it. So would it be good to put that in legislation?

Mr. MUELLER. I would have to look at that issue. I have not spent some time looking at it. I can tell you that it has worked satisfactorily to date, but I know there are concerns about what might happen in the future.

Mr. WOLF. So if you could, and let us know.

Mr. MUELLER. Yes.

DOMESTIC RADICALIZATION/COUNTERING VIOLENT EXTREMISM

Mr. WOLF. Domestic radicalization. Last year we discussed domestic radicalization as a growing terrorist threat, particularly radicalization over the Internet, which you cited as a major factor in the uptick. In 2011, we saw a significant number of attacks, or attempted attacks, by people radicalized in this country. Chesser, who was a young man from Oakton, Virginia—Oakton was in my congressional district—was radicalized. We see the five Pakistanis from Alexandria. We see the guy from Sterling who was going to attack the Metro. What are the latest trends, and what successes and challenges are you having in countering this threat?

Mr. MUELLER. Well, the latest trend is an uptick, I would say, in individuals who are self-radicalized in the United States without touching someone, whether it be from overseas or somebody domestically. These individuals are self-radicalized in the sense that they become immersed in the Internet, find their calling on the Internet, can contact and work with other people on the Internet, can be trained on the Internet, and can undertake their attacks based on what they have learned by themselves without operating in a conspiratorial way with others.

Over the last 2 years we have had a number, I would have to get you the explicit number, of the homegrown radical extremists.

Mr. WOLF. For the record, we would like to have that.

Mr. MUELLER. We will get you that. And I am not certain whether it is in my full statement or not, but we will get you that.

[The information follows:]

HOME GROWN RADICAL EXTREMISTS

The number of Homegrown Radical Extremists is classified and will be provided separately in a classified setting.

Mr. MUELLER. So that is our greatest concern.

Now, we have had some success in terms of identifying those individuals, both off the Internet, but also using sources. We have had success in terms of arresting those persons, and they have gotten very substantial sentences. But I expect that to continue. The latest one was Khalifi, the individual two weeks ago, who was arrested. His target ultimately, not at the outset, was the Capitol. He was arrested on his way to undertake that act.

Mr. WOLF. Well, I think the Bureau—you and the Bureau have done a good job, and I want to make sure that the record shows that I believe you all really have done an excellent job.

I guess the concern that I have when I look, Awlaki was an imam in a mosque in northern Virginia. As a result of Awlaki, 13 people were killed in Fort Hood. The major was radicalized with regard to Awlaki. If you read the history of the Chesser case, he was radicalized, he was in communication with Awlaki. Is there not a way to prevent that? Because I know there are two theories: One, let's access and see, and monitor and follow, and then intercept and then convict. But if Chesser, who was taken in as a young boy, if he did not have the access to Awlaki, I am sure he would not have gone wrong. If the major at Fort Hood had not been in communication constantly—so I know you use it for investigative tools.

Is anyone looking at how do you stop this? And I know the Internet can move around. But is there any way of stopping this, when you see an Awlaki come up on the radar, to shut it down and knowing that it is coming back in two weeks?

Mr. MUELLER. The Internet is such now that it is very, very difficult to shut down one video, or a number of videos, or a person's capability to get up on the Internet and upload that which they want. It is not that there have not been instances where that has occurred, but from Awlaki, his death removed from the Internet an individual who was able to reach out and touch any number of people by reason of the Internet. When he was here in the United States, he would touch people himself by talking to them, and by lectures and the like. His removal from the scene removed from the Internet his ability to draft additional treatises and publish them on the Internet. But that does not mean that his impact is totally removed, because we have the older sermons, and the older material he had posted on the Internet way back when that are continuously utilized to date. It is a very difficult issue to try to eliminate something from the Internet.

Mr. WOLF. Is there any way of looking at how you can?

Mr. MUELLER. I can tell you that there are a number of agencies who are looking at that, yes. I cannot get into in public the efforts that have been undertaken to do that but there are efforts, and some of them have been successful.

Mr. WOLF. Has anyone taken Awlaki's place? I mean, he spoke English.

Mr. MUELLER. People would say there are some aspirants, but no. He had a place that he had developed over a period of time

where he had some charisma, he had organizational ability, and he was a leader that would be very, very difficult to replace.

Mr. WOLF. In December, the President's national security staff issued a strategic plan for countering violent extremism. The plan talks about the establishment of a countering violent extremism coordination office in the FBI. Is this included in your fiscal year 2013 budget request, or are you planning to submit the required reprogramming to establish such an office?

Mr. MUELLER. To the extent that we have that, it is the consolidation of our outreach efforts, and we have not sought a separate budget for it.

Mr. WOLF. Will there be an office then? Will there be an office of—countering violent extremism coordination office?

Mr. MUELLER. I would have to check back with you on that, utilizing that phrase, and where that is at this juncture.

Mr. WOLF. Okay. Because then the next question would have been if the answer was yes, what will the new office do? And what role do you expect the FBI to play in it? So maybe you can just give us the answer first.

Mr. MUELLER. I will get back to you on both those questions.

[The information follows:]

COUNTERING VIOLENT EXTREMISTS OFFICE

The FBI has recently established a formal Countering Violent Extremists (CVE) Office within the National Security Branch. In an effort to better understand and counter the growing threat of homegrown violent extremism, and in response to the August 2011 White House report titled *Empowering Local Partners to Prevent Violent Extremism in the United States*, the CVE Office has been designed with the reasonability for developing, promulgating, and executing the DVE strategy for the FBI, as well as coordinating all CVE-related activities across the FBI enterprise.

This office does not perform a new function, but merely consolidates responsibility and coordination for this effort in one central location, reporting to the Executive Assistant Director for National Security.

Mr. WOLF. Okay. On the Awlaki incident, as you will recall, I wrote you several years ago regarding a *Fox News* investigative report looking at the Bureau's role in allowing Anwar Awlaki back in the U.S. And it troubles me when I hear some of the family members from Fort Hood. It is painful, because I think there were things missed by certain segments of the government. And there are 13 people that are no longer alive. It is not just kind of he did a demonstration or something. He killed people. And so allowing—

Mr. MUELLER. Let me just say that I am painfully aware of that.

Mr. WOLF. I know you are.

Mr. MUELLER. And our sympathy goes to the victims' families. It is very, very painful. And every one of us feels badly that it occurred and that we could not stop it.

Mr. WOLF. So we wrote about allowing Anwar Awlaki back in the U.S. in October 2002 despite an outstanding arrest warrant. Now that Awlaki has been killed, I believe the Bureau, hopefully, could be more forthcoming with regard to the 2002 incident. It is important that we look at how past incidents were handled so we are better prepared for the future. And I cannot help but think how history could have been different, especially at Fort Hood, if Awlaki had been arrested and prosecuted in October of 2002. Just like maybe if the computer had been opened by your agent down in

Phoenix. I mean, you cannot go what-ifs, but I think now that Awlaki is dead, I think it would be helpful—certainly if you could not do it publicly you could do it privately—to see what impact that had.

On October 10, 2002, an FBI agent ordered Anwar Awlaki released from Federal custody early that morning when there was an active arrest warrant. So we would like to see, if we could, or maybe if you could let Mr. Rogers know, but is there something that went on there that we learned by so that it never happens again?

Mr. MUELLER. I know a number of committees and committee members have been interested in the facts of what happened early on with Anwar Awlaki, and we would be happy to give you a briefing of what we know. We have done it before; we will do it again.

Mr. WOLF. Okay. Thank you.

Mr. Honda, you want to?

Mr. HONDA. Can I pass?

Mr. WOLF. Sure. Sure.

COUNCIL ON AMERICAN-ISLAMIC RELATIONS

I understand that for the last few years, the FBI has suspended any formal engagement with the Council on American-Islamic Relations, CAIR. The fiscal year 2012 appropriations indicated support for that policy and directed the FBI to notify the committee if there were any violations of the policy. We have not received any notifications, so we can conclude that all FBI offices have been following that policy without exception.

And let me just say also, I appreciate the Attorney General testified here last week and said he did not meet with CAIR either. But since we have not received any notifications, can we conclude that all FBI offices have been following that policy without exception?

Mr. MUELLER. The policy relates to the CAIR, the organization and leadership of it.

Mr. WOLF. Right. There is language in the appropriations report.

Mr. MUELLER. Yes. I understand. The difficulty comes when there are individuals in communities who may be members of CAIR or in some way affiliated with CAIR that are substantial leaders in the community with which we otherwise may have some interaction. So I think our policy is clear to all special agents in charge, but the way you phrased the question, I am not certain I can give you an assurance. In fact, I am sure I could not give you an assurance that we have not intersected with persons who may have some association with CAIR around the country, because they are individuals who are substantial members of their communities who may have some association with CAIR, but not necessarily the CAIR leadership, which is our principal concern.

Mr. WOLF. Well, as I understand it, that one of the reasons why the FBI has a specific policy regarding CAIR is that CAIR was listed as an unindicted coconspirator in the Holy Land Foundation case.

Mr. MUELLER. That is correct.

Mr. WOLF. Yeah. Do you have other nonengagement policies with others who were unindicted coconspirators in the Holy Land Foundation case?

Mr. MUELLER. At this juncture I do not think so.

Mr. WOLF. Well, I am a little troubled here because we do have specific language in. And obviously, if you were investigating a crime or something, you would. But I thought there was a fairly blanket policy of not meeting with CAIR. And there is specific language in the appropriations bill. And if we are going to do oversight, I mean, I think that is an important part. I think it is very important. CAIR was an unindicted coconspirator.

Mr. MUELLER. What I am saying is we absolutely understand your concern and share the concern. I believe we have had discussions with your staff in terms of incidents where there have been persons that have met with individuals who may have had some association with CAIR. But in terms of a relationship with CAIR as an entity, we have not had that, to my knowledge.

Mr. WOLF. Well, could you just share, because—

Mr. MUELLER. Surely.

Mr. WOLF [continuing]. Because if an office around the country were meeting with CAIR, they would be in violation of FBI policy and our report language.

Mr. MUELLER. I will check on that.

[CLERK'S NOTE.—Information provided subsequently by the Bureau indicates that the FBI has not participated in any CAIR-sponsored events.]

Mr. WOLF. Okay. Mr. Honda, do you want to—

Mr. HONDA. Well, I was going to ask another question. But since you brought up this subject, Mr. Chairman, are you saying that the law prohibits folks to meet with CAIR, Members of Congress to meet with CAIR? Is that what I am hearing?

Mr. WOLF. Excuse me. I was talking.

Mr. HONDA. With this line of questioning, am I to understand that we have a law on the books that says that folks like myself—

Mr. WOLF. No, absolutely not. Positively, categorically, absolutely, positively, categorically you can meet with anybody you want to. It impacts on absolutely no one other than the FBI because they were an unindicted coconspirator. But, Mr. Honda, you can meet with anyone. And it has nothing to do with anybody else, period. It was report language in the bill that passed here.

Mr. HONDA. Okay. Thanks. I appreciate that clarification.

And, Director Mueller, thank you for being here. And I appreciate the work that you are doing for our country. And I know it is not the easiest, and probably been targets of quite a few criticisms. But I guess that is what keeps us on our toes. My mother used to say, if you are in hot water, you better come out clean. I love my mother.

CORRECTIVE TRAINING REGARDING ISLAM

One of the questions I had was one of civil rights. As you know, the media has reported over the past year on the use of FBI training materials that stereotyped some Muslims or contained factual errors about Islam. In this regard I really appreciate your commitment to purging your department of these materials, and I think that is the right thing to do.

Can you tell me what measures you are taking to ensure that agents who were exposed to the materials or presentations received corrective training, given the amount of material you found on Muslims, approximately 300 presentations among other things? You are conducting a similar review of your training materials relating to other minorities. I was just wondering what is being done on the corrective training, because as a schoolteacher, we have a saying that if we teach misinformation, it takes 30 more times and effort to correct that misinformation. So I was wondering what actions you are taking right now.

Mr. MUELLER. Well, when this came to our attention, I believe it was last summer, we took a number of steps. The first was to put a panel together of five individuals with substantial credentials in the area, both within the FBI and outside the FBI, to put together the guidelines and protocols for training in this arena, counterterrorism. Then we went through our training materials since September 11 which equates to approximately 160,000 pages of training materials. We matched up those training materials with the guidelines regarding appropriate training that should be given in this arena, and came up with far less than, I think, 1 percent where the training material was inappropriate and was pulled.

In the course of that process, we also looked at who had been exposed to those training materials and, to the extent necessary, went and rectified that. Because the inappropriate training materials were such a relatively small portion of the training materials we had given, this was not an inordinately large or difficult task. So we will use those guidelines in the future.

In terms of the broader consequence to other communities with whom we operate, we have changed the process so that there is an approval process for training materials that we did not have before. In other words, we have 34,000 persons and 56 field offices, we are often asked to train. We did not want to burden the process, so everybody had to go through headquarters to get approval. But we now have a process in place that better monitors what we are doing around the country, particularly when it comes to sensitive areas.

Mr. HONDA. Thank you.

NYPD SURVEILLANCE

I wanted to touch on the New York Police Department surveillance issue. As you know, it has been reported that since 9/11, the New York City Police Department and the CIA have engaged in overbroad and discriminatory efforts to collect information on the Muslim community without the establishment of reasonable suspicion and outside the scope of joint operating agreements. As you know, the President's national strategy to prevent violent extremism in the United States says that al-Qaeda uses instances like these as a recruiting tool.

Considering the comment that your own general counsel, Valerie Caproni, made regarding the possible unconstitutionality of these investigations, what effect do you believe that these overbroad investigations are having on our national security?

Mr. MUELLER. Let me start by saying at the outset that Ray Kelly and the New York Police Department have done a remarkable job in protecting New York. The fact of the matter is that New

York has been and will continue to be a target. We have worked closely, very closely together with them. We operate under a particular set of guidelines issued by the Attorney General. My understanding is that the New York Police Department has a separate set of guidelines, I believe court-imposed, under which they operate. Any set of guidelines has a combination of requiring the predication for undertaking investigative action coupled with an approval level for undertaking that particular action. I am not familiar with the internal NYPD guidelines or those guidelines that have been imposed by the court or the oversight bodies in New York, so I am really not a good person to evaluate the application of the guidelines to NYPD.

Mr. HONDA. So if the guidelines are court-imposed, are those details available in public, for the public to see for examination or for some sort of constitutional test?

Mr. MUELLER. I think it is probably internal to New York. I am not certain to what extent they are public guidelines. I know that Ray Kelly gave a speech at Fordham, I believe last week, in which he alluded to some of that. Frankly, I had not been familiar with it but quite obviously, he and those from New York are more familiar than I.

Mr. HONDA. I am not going to argue about, you know, the job that the New York Police Department has done to be contrary. But the discomfort I feel, even if it is court ordered, is in the history of this country back prior to Pearl Harbor and after Pearl Harbor, there was a lot of court orders that were given that sort of trampled on some communities' constitutional rights. And I do not know whether we have changed much in terms of responding to hysteria because of war or our racial sentiments, but certainly I think someone has to have some responsibility to check the behavior and check it against some sort of template that reflects constitutional snuff. And I am just wondering whether the FBI or any department, especially at DOJ or the Attorney General's Office, have looked at that and considered it?

Mr. MUELLER. Well, let me just start by saying I think things have changed. Since September 11, I believe the Bureau has maintained the balance between being effective against terrorism, but at the same time adhering to our values of assuring civil rights, civil liberties, and privacy concerns. In every decision we make, they come into it.

We have made mistakes. When we make mistakes, there is an inspector general, there are a number of panels of Congress that look at us, and the media, in ways that you did not have in the past. I think everybody in the Bureau understands that we will be evaluated in the future not just on whether we were successful in protecting the American public, but if we did so within the constraints of the Constitution, the statutes, and the Attorney General Guidelines.

As to New York, as I say, I cannot really speak to that. Whether the Department of Justice is doing something with regard to the newspaper articles I know you are talking about, I just am not certain.

Mr. HONDA. Thank you. I thought I would take another swipe at it anyways. Thank you.

Mr. WOLF. Mr. Graves.

Mr. GRAVES. Director, thank you for being here today. And sorry I am a little bit late coming in.

I appreciate the good work you and your team are doing to protect our citizens from the various threats that exist out there. And I imagine that it is beyond our imagination the various threats that you have to deal with on a regular basis, and a tremendous job has been done, clearly, over the last several years.

FOOD SECURITY

And I had one question as it relates to livestock. It seems that years ago there was a direction by the Department to I guess take a look at terrorist attacks with livestock, in relation to livestock, or into the livestock supply across our country. Can you give us an update on that, what you have seen as a Department, and how you work with other agencies in that area as it relates to livestock, and any attacks that might come in that area?

Mr. MUELLER. Several years ago, Congressman, we established a Weapons of Mass Destruction Division within the Bureau whose focus is exactly on that, biological, chemical, and nuclear threats that we face. I know we, also address that through our 56 field offices. Not only that, but also in terms of the intelligence that we get from overseas. If people are looking at anthrax, whether it be against persons or against livestock, we make certain that we follow any leads in that regard.

There also is an annual, I want to say, convention. It is not a convention, but an annual study, generally in the Midwest, that is done, which is a focal point for the newest and best information one has in terms of the possible threats to the food chain, livestock and the like, throughout the United States. DHS, quite obviously, has a substantial role here. It is being addressed. To the extent, knock on wood, that you do not have an incident, then it does not come to the fore and is not much publicized, but I can tell you people have been and continue to be concerned about that potential threat.

Mr. GRAVES. That is great. I appreciate your work on that, because you are right, it seems that there is—the traditional terrorist attack mode is what our focus always is, but the food supply out there as well, and something that has been under threat, I imagine, at some point or another. So I want to thank you for your work there and working with other agencies. I just wanted sort of an update on that, because I know it was something that was implemented a few years ago. Thank you.

Thank you, Mr. Chairman.

Mr. WOLF. Sure. Thanks.

HIGH-VALUE DETAINEE INTERROGATION GROUP

In fiscal year 2012 the Congress approved your requested program increase of \$16.8 million to formally establish the High-Value Detainee Interrogation Group (HIG). Is the HIG up and running at full strength? And do you have a full complement of staffing and cooperation from other agencies?

Mr. MUELLER. Yes. It has been effective. Over the last two years, I think we have had 14 instances where we have deployed elements of the HIG to conduct interrogations. So it is up and running.

I would have to get back to you specifically on whether we are up to full complement, but I know when I looked into it a month or two ago, it was very effective and is being utilized.

Mr. WOLF. Okay. So the other question, which you sort of answered, are you satisfied with the results? But how many deployments has the HIG—

Mr. MUELLER. If I am not mistaken, 14 in the last two years.

Mr. WOLF. Okay. The committee asked you for a report, which is due on March 17, detailing the research activities of the HIG, the results of such research, and any recommendations for the development of new interrogation techniques for use by the U.S. Government. I assume we will get that report. Do you have any preview of it?

Mr. MUELLER. I have not seen a draft, but I will check on that.

NATIONAL DEFENSE AUTHORIZATION ACT

Mr. WOLF. Okay. Section 1022 of the National Defense Authorization Act mandates military detention for noncitizen terrorism suspects. The President has now issued a policy directive which appears to interpret the waiver provisions broadly so that military detention may very well not occur.

Can you summarize for us, for the members of the committee, the major points of this new directive? And what are the impacts, if any? You mentioned earlier, would you expect any impacts on the FBI at all?

Mr. MUELLER. Very generally, what it does is set forth a set of procedures so that when an individual comes into the United States, who is not a U.S. person, not a U.S. citizen, but is affiliated with al-Qaeda and in the process of or is participating in undertaking a terrorist attack, that military custody is evaluated.

Our concern at the outset was that when you have a fast-breaking terrorist incident, that this may cause some concern. What the President's statement does is assure that if we are in the midst of an investigation, and we have a number of people, one of whom may not be a U.S. citizen, that that investigation is not disrupted; that if we are in the process of interrogating an individual or started the interrogation, that process is not interrupted; and that to the extent that we have an ongoing investigation, we will be able to maintain that investigation without it being interrupted or stopped while persons decide whether or not the individual should go to military custody or stay with Article III.

So, as I responded earlier, I think it satisfies concerns I have about the disruption of an ongoing, very fast-moving investigation while persons determine where the person ultimately will end up, either for trial or for further investigation or interrogation.

Mr. WOLF. And is the primary purpose still intelligence?

Mr. MUELLER. Yes. The primary purpose for when we detain somebody involved in terrorism, whether they are U.S. citizens or not, is intelligence and to determine whether that person has information on other plots. That is the primary purpose.

Mr. WOLF. Under these new regs would the Christmas Day bomber have been treated any differently?

Mr. MUELLER. I do not believe so.

Mr. WOLF. So that pretty much played out the way that it did?

Mr. MUELLER. I believe so. We certainly conducted the initial interrogation without Miranda warnings. Later that evening they were given. Now, it may have delayed those Miranda warnings depending on the circumstances.

Mr. WOLF. Okay. This may delay?

Mr. MUELLER. It may have had some impact on the Christmas Day bombing. It is hard to tell in retrospect.

Mr. WOLF. I would assume somebody will look at this to see what the impact would have been.

Mr. MUELLER. Yes.

FINANCIAL AND MORTGAGE FRAUD

Mr. WOLF. Okay. Financial fraud. The one and only program increase requested in your fiscal year 2013 budget is \$15 million and 44 positions to combat financial fraud. Can you describe the FBI's role in the Financial Fraud Enforcement Task Force and why more resources are necessary in this area?

Mr. MUELLER. We have, as I think I indicated, many mortgage fraud cases. Any additional resources help us address the 3,000 mortgage fraud cases that we have. The \$15 million will enable us to establish an additional two hybrid squads, which we use to address the most complex financial crimes. This will enable us to be able to bring in additional expertise in terms of analyzing and cross-referencing complex financial documents. I will increase our case production by probably up to 240, 250 cases. So the additional resources will be utilized to continue to address the inventory of cases we have.

Mr. WOLF. We understand that you currently have over 1,200 FBI employees working on economic fraud cases. How many agents work on that, and how many agents do you have total in the FBI?

Mr. MUELLER. Well, I would have to get back to you. We have between 13,000 and 14,000 agents at this juncture, and I would have to get back to you on the numbers.

Mr. WOLF. Okay. How many agents are working on—

Mr. MUELLER. I would have to get back to you on that specific number.

Mr. WOLF. If you would.

[The information follows:]

NUMBER OF AGENTS WORKING ECONOMIC FRAUD

The FBI dedicated approximately 900 special agents to investigating more than 8,900 complex financial crime cases during FY 2011 and dismantled more than 179 complex financial criminal enterprises. Additionally, the FBI has approximately 470 reimbursable agents dedicated to Heath Care Fraud investigations.

Mr. WOLF. Has there been a new burst of fraudulent activity that is driving this? Is there something out there that is driving this?

Mr. MUELLER. No, this is the problem that started in 2008 in terms of—

Mr. WOLF. Just a continuation?

Mr. MUELLER. Yes.

ECONOMIC SECURITY

Mr. WOLF. Okay. Economic security. As you may know, about 10 years ago, two senior officers in the People's Liberation Army wrote a book called *Unrestricted Warfare*. The U.S. Intelligence Community eventually got a copy and translated it to English. The book outlines how the Chinese could use asymmetric warfare to weaken the United States, including economic warfare and cyberwarfare.

I recently met with a group that was asked to do research on this by the Defense Department a few years ago. Their conclusion is that the U.S. is unprepared to deal with the threat of economic warfare which could occur when a foreign country or actor uses its sovereign wealth funds or other financial tools to try to undermine the U.S. market, literally impact the stock market. With the growing number of sovereign wealth funds and foreign state-backed instruments, some believe that our open markets could be vulnerable to manipulation by a foreign government or even a terrorist group.

Has the Bureau looked at this threat in the past, and do you have any current strategic reviews or cases involving economic security involving foreign players? And lastly, will you be willing to have the Bureau lead an interagency group, including the Treasury, the SEC, and others, to look at the threat and potential preventive measures that the U.S. could take? This could potentially have a major impact on the stock market, which would therefore have a major impact on the economic situation of the country. We saw what took place in 2008.

Mr. MUELLER. Well, I had not been familiar, until you alerted me, to the possibility of the manipulation of sovereign funds as an element of attack or war. So having alerted me, we will follow up on that. To my knowledge, it is one of a number of theories out there. But it certainly warrants us sitting down and trying to evaluate whether it is a threat of the future that we ought to be taking precautions against now.

Mr. WOLF. Okay. Maybe I can have the people—if you could contact us to tell us who we can have them speak to your agents. They were recommended by former Attorney General Mukasey I think. So if you can tell us who, we will then put them in touch—

Mr. MUELLER. We will have the right people sit down and look at this.

Mr. WOLF. Okay. Thank you.

Mr. Serrano, do you want to—

Mr. SERRANO. Thank you, Mr. Chairman.

CIVIL LIBERTIES

Let me just piggyback a second on what Mr. Honda brought up. I also join those folks who commend you for your service and staying on longer. As far as I am concerned, you can stay on for as long as you want to. You are not supposed to shake your head during a hearing. You are supposed to be agreeable to everything. But anyway, that is out of the respect we have for you.

But you and I have discussed this many times, the delicate balance between doing what is right for the country and making sure that we protect people and respect people's civil rights and civil lib-

erties. And I commend you for the fact that you have always been conscious of that and trying to work on it. And as I said many times to you, especially after September 11, if, in the process of getting the bad guys, we trample on the rights of the good guys, then at the end of the day, we may have lost out and they may have won by changing our behavior. So even if we do not make a big deal about it, we are all conscious of that and all wish that that stays on the minds of all folks.

ENTRY PRECAUTIONS/PROTECTIONS

Let me ask you a question. Last month there was an FBI raid in Massachusetts, and there was an issue of a chainsaw and so on. In talking about balance again, how does the FBI deal with the fact that for the safety of the innocent, for the safety of the agents themselves, how do you try to balance? And what do you look at going forward to make sure that incidents like those are not necessarily commonplace?

Mr. MUELLER. I am not certain of the incident, but the way you relate it would seem to me that we used a chainsaw in terms of an entry.

Mr. SERRANO. Right.

Mr. MUELLER. And that is a balance as to what kind of protection or precautions do you take in terms of an entry? I am not familiar with the facts of the case. I did allude earlier to the fact that we have lost more police officers in the last year than we have lost in comparable timeframes before. Consequently, the hardest thing for me or the hardest thing for a leader of an agency is to lose an agent and deal with the victim's families, and to question if you could have done more to protect that particular agent. With the increase in capabilities of criminals, the types of firearms that are available, the type of velocity, the type of damage that can be done, yes, we take substantial precautions. But in my mind, I think they are appropriate.

I would have to look at this particular incident. Though in every one of these incidents we do an after-action report.

Mr. SERRANO. Right.

Mr. MUELLER. And I would have to look at that and see if there was something in that after-action report that we had determined that we should change in the future. But any time we are involved in a shooting or any time we have an entry in which there are issues, we do an after-action report to make certain that not only did we do everything to protect our agents, but also we did so in understanding and protecting those who may be in that house at the time we make an entry.

Mr. SERRANO. Thank you. And I appreciate that.

Recently the Supreme Court ruled—

Mr. MUELLER. If I may add one thing.

Mr. SERRANO. Go ahead.

Mr. MUELLER. What comes to mind also is an agent in Pittsburgh 2 years ago who made an entry in the morning involving a drug dealer the drug dealer runs downstairs. The wife is upstairs. The agent comes in at the bottom of the stairs. The wife at the top of the stairs shoots him and kills him. Those images live with you.

Mr. SERRANO. Right.

Mr. MUELLER. So the after-action report is what did we do wrong in not protecting that agent, as well as could we have done things better so that we did not get in the circumstance?

Mr. SERRANO. And I appreciate it. I certainly appreciate that.

GPS TRACKING

Let me tell you that recently the Supreme Court ruled that the use of GPS trackers without a warrant was illegal. As a result of that, I understand that you had to turn off and retrieve some 3,000 trackers. The high number of trackers makes it seem like you were heavily relying on this tactic. How does that ruling change the way you now approach these issues, since the issue seems to be how frequently it was used? And secondly, this may call into—does this call into question for you to review some of those activities?

Mr. MUELLER. I would say in regard to the last, no, because I believe when we used the tracking devices, there is a rationale and approval process we go through to assure that it is being appropriately done.

I cannot speak to the numbers, but a substantial number of trackers we have had to turn off. One ought to balance, on the other hand, the fact that it often saves us from physical surveillance. Putting a physical surveillance team out with 6, 8 or 12 persons is tremendously time-intensive. So it will inhibit our ability to use this in a number of surveillances where it has been tremendously beneficial.

We have a number of people in the United States who we could not indict. There is not probable cause to indict them or to arrest them, but who present a threat of terrorism. These individuals may be up on the Internet, may have purchased a gun, but have taken no particular steps to take a terrorist act. We are stuck in the position of surveilling that person for a substantial period of time. Trackers enabled us to utilize resources elsewhere.

So it is going to have an impact on the work that we do. But, of course, we will comply with the ruling of the Supreme Court and make certain that whatever test is ultimately adopted, that we will adhere to that in terms of utilizing this device.

Mr. SERRANO. Yeah.

HOLOCAUST MUSEUM

One last point. I have gotten you on the record saying something on a couple of occasions, because I think it merits to be repeated, and I am alluding to part of the training where you would have the agents visit the Holocaust Museum.

Mr. MUELLER. Yes.

Mr. SERRANO. Is that still part of the training?

Mr. MUELLER. Yes, it is.

Mr. SERRANO. Could you just once again this year—

Mr. MUELLER. Louis Freeh, my predecessor—

Mr. SERRANO. Exactly.

Mr. MUELLER [continuing]. Believed—and I share that belief, but he gets the credit for establishing this practice—assured that every agent that went through our Academy also visited the Holocaust Museum so that they have a vivid example of what can happen

when a police agency goes rogue, does not adhere to the Constitution, the applicable statute or the Attorney General guidelines.

Mr. SERRANO. Well, I commend you for that. And as I have said in years past, I think that that is a very important sign of what the Bureau is trying to do. And I think you are right, we have to remind ourselves at all times, as we do, what we need to do, of what can happen when it is not done properly and when people go berserk.

So I thank you, and I thank you for your service.

Mr. MUELLER. Thank you, sir.

Mr. SERRANO. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman.

DNA BACKLOG

I wanted to mention—I should have mentioned it during the first round—a note of congratulations on eliminating the DNA backlog. I understand that the Federal backlog is gone completely, and the time to turn around a case sample is 30 days, which is just remarkable. So, congratulations.

Mr. MUELLER. Can I mention one thing in that regard?

Mr. SCHIFF. Yes.

Mr. MUELLER. And that is, it is resources. We were able to do that because the resources were given to us to, on the one hand, hire additional examiners that would address the backlog, and also invest in technology that would also assist. So I thank you for the resources to eliminate that backlog.

Often, we are criticized for not eliminating a backlog or something we have not done, but, again, it takes resources, often, to get it done. So our thanks to the committee, because we would not be in the position we are today without the support of the committee on that particular issue.

Mr. SCHIFF. And we saw a perfect illustration of why I think it was so important to do. In California, in 2003, a 17-year-old high school student was raped. In 2006, the rapist was arrested and his DNA was taken, but because of the backlog, it wasn't uploaded until 2010. And when it was uploaded in 2010, he was apprehended.

And around the country, there are a great many backlogs in local jurisdictions. It is wonderful that we have now gotten rid of the Federal backlog, but we are still combating this at the local level. And there are cases that could be quickly solved with a simple upload. And every year that we wait in those States, more perpetrators can go on to rape other victims.

So, in any event, congratulations, and thank you for your good work.

We have focused a lot on DNA because of its power, but I know there are analogous problems with backlogs in other ballistic and other forensic labs, at least at the State and local level. Are there any other backlogs within the Federal system that you think we should be aware of or that you need resources to address?

Mr. MUELLER. I will tell you, there was one that was remedied in the last 6–8 months, and that is in the Federal prison systems, making certain that we had swabs. That was a backlog for a period

of time that we worked with the Bureau Department of Prisons to have reduced.

TEDAC IED BACKLOG

There are other backlogs. I mentioned TEDAC. Running those IEDs through our labs, there are backlogs there. And, again, it is, to a certain extent, a question of resources to get it addressed. But I would have to do a canvas of other areas where we might have backlogs, particularly if it is outside the laboratory.

Mr. SCHIFF. Well, I would love to get that information, and I am sure the chair would as well, particularly as it involves something like IEDs. So if you could share that with us, we would love to do all we can to make sure you have the resources to address that.

I want to ask you how the relations are these days between the FBI field offices and the U.S. Attorneys' offices. I know historically there has been a very strong partnership, but even with strong partnerships there are occasionally frictions. As I recall, sometimes frustrations among Bureau agents that certain cases don't get accepted, and frustrations in the other direction for other reasons.

Are there any categories of cases that your agents tell you they wish that the U.S. Attorneys would be pursuing that they aren't for either policy guideline reasons or resource reasons?

Mr. MUELLER. I would say, the traditional areas you and I know are white-collar criminal cases that one would think languish too long because you are looking for the maximum amount of money or umpteen mail fraud/wire fraud counts. But that is only sort of a lingering issue that is generally there.

I don't think there is anything substantial where we are on different pages. If there is, I am going to hear about it tomorrow, because the U.S. Attorneys are meeting and I am addressing all of them. I am sure they will have a few questions afterwards. Maybe I ought to talk to you Friday, because there are areas that I am sure will be brought to my attention by the U.S. Attorneys where they would appreciate me doing something different than perhaps we are doing.

Mr. SCHIFF. Well, please let us know if something comes up that we can help with.

Mr. MUELLER. I will.

MENTAL HEALTH RECORDS IN THE NICS

Mr. SCHIFF. Last question. In November of last year, your colleague, David Cuthbertson, the Assistant Director of the Criminal Justice Information Services Division, FBI, testified before the Senate Judiciary Committee about progress being made to ensure that State and Federal agencies are reporting relevant mental health, drug abuse, and other records to the NICS background check system. Mr. Cuthbertson testified that, while the number of mental health submissions to NICS from State agencies had increased significantly, a significant percentage of those records were from a small number of States.

While I applaud the progress and am pleased that California has been a leader in submitting the relevant records, it is my understanding that the NICS database is still very incomplete. An analysis by the Mayors Against Illegal Guns shows that 23 States and

the District of Columbia had submitted fewer than 100 mental health records. In addition, Federal agencies are not reporting records despite the fact there is a Federal law requiring all Federal agencies to report records of any person who is prohibited from purchasing firearms to the FBI. For example, 52 out of 61 Federal agencies have not reported any mental health data to NICS.

Can you share with us what steps the FBI can take to better enforce the laws that require reporting of records of prohibited firearm purchasers? And is the administration budget request of \$5 million enough to accomplish the goal of ensuring that the records of all prohibited firearm purchasers are in the NICS background check system?

Mr. MUELLER. Well, if I break it up into the other Federal agencies, that is something we ought to have more leverage in terms of compliance with. That is something I would have to go back and check.

When it comes to particular States and localities and jurisdiction, it is, as you can understand, very, very difficult. Particularly in States that do not have the computerization, say, that California has and are facing budget deficits. We can encourage, we can cajole. We don't have a hammer. So we can encourage, but ultimately, I am not familiar with the leverage we would have to make States and other localities comply.

I share your concern. I wish there were a mechanism that we could, on the one hand, leverage or enforce the requirement and, on the other hand, have the funds available so that the localities could hire that person that was responsible for reporting these.

Mr. SCHIFF. Mr. Director, is it your sense that most of the lethargic response from the State and local jurisdictions is a resource issue or a computerization issue, or are you encountering some States that simply refuse to comply?

Mr. MUELLER. I would have to get back to you, but I don't think it is a refusal to comply. I think people understand, particularly in the wake of what happened at Virginia Tech, the necessity for compliance with the law. I think it is something that you have to put into place, fund, and make it a discrete responsibility to do.

It is also very difficult because monitoring what happens in court, which can change, if not weekly, monthly, is difficult also. So you put a person on or a person off for a period of time, if you don't have the personnel that are monitoring this, then the records are not updated. And it is frustrating.

I don't think any of the persons we deal with are saying, "No, I don't want to do it, I am just not going to do it because it is the Federal Government," or something like that. It is just another burden, an unfunded mandate. I would have to check on this, but I think that is the biggest hurdle.

Mr. SCHIFF. Thank you, Mr. Director.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Schiff.

STIMULUS FRAUD

Another major activity of your white-collar crime program is the investigation of fraud related to the \$787 billion provided in the 2009 stimulus. Your document states that, quote, "The FBI has al-

ready seen examples of how stimulus funding has resulted in a myriad of fraudulent schemes,” end of quote.

The stimulus bill included almost \$16 billion under the jurisdiction of this subcommittee. Can you give us some examples of stimulus fraud that you have seen?

Mr. MUELLER. I would have to get back to you with particular examples—

Mr. WOLF. Okay.

Mr. MUELLER [continuing]. And tie it down, particularly to the stimulus funding.

Mr. WOLF. Okay.

Mr. MUELLER. I have to cull through and make that attachment.

Mr. WOLF. Okay.

Ideally, on some of these things, we can sort of have another—you don’t have to come—but a meeting on the different things, so we can go back. And I am making little notes here.

Mr. MUELLER. We would be happy to take the list and get back to you on those issues, Mr. Chairman.

[CLERK’S NOTE.—Additional information on this subject is included in the Questions for the Record at the end of this transcript.]

COMPUTER INTRUSIONS/CYBER THREATS

Mr. WOLF. Computer intrusions: Your fiscal year 2012 appropriation included an increase of \$18.6 million to investigate computer intrusions, including making your National Cyber Investigative Joint Task Force a 24/7 operation. Is it now operating 24/7?

Mr. MUELLER. I would have to check on that.

Mr. WOLF. Okay. I visited—

Mr. MUELLER. I believe it is. But, again, I would have to check.

[CLERK’S NOTE.—Information provided subsequently by the Bureau indicates that the NCIJTF will be opening on a 24/7 basis before the end of calendar year 2012.]

Mr. WOLF. Okay. I visited there and was very impressed. And we have asked the Bureau to host—we are going to do it on March 27th, and we will be doing a letter to every Member inviting them to come and see.

Do you think there is enough awareness in the government about the extent of the cyber threat to our economy and to our country?

Mr. MUELLER. Do I think there is awareness? Yes, I do think there is awareness.

Mr. WOLF. Do you think there is enough awareness? I mean, if you do, I am not trying to change your mind. I don’t. Because we had the head of the White House Office of Science taking his laptop and his BlackBerry to China, and he is the top guy in the White House. So I just—

Mr. MUELLER. If you are talking about awareness in terms of personal travel to various countries, I would agree with you, there probably is inadequate awareness of the threats that you have, in terms of having your cell phone, your laptop, your iPad hacked into by entities in particular countries. I do not think there is sufficient awareness on that.

Mr. WOLF. Yes.

The committee directed you to increase training to develop the capabilities of field agents to investigate national security cyber intrusions. Has that been done?

Mr. MUELLER. Could you ask that again, sir, if you would?

Mr. WOLF. The committee directed you to increase training to develop the capabilities of field agents to investigate national security cyber intrusions.

Mr. MUELLER. Yes. We are in the process, as I said before, for not only the specialists on the cyber squads, where we have gotten enhanced training for all of those individuals, but for the workforce as a whole. We need to be computer-literate. We are in the process of doing that.

Mr. WOLF. How would a cyber attack with national security implications be investigated at the field level? Do you have a cyber squad that specializes in national security cases in each field division? And if not, would that make sense in light of the caseload and the importance of the cases?

Mr. MUELLER. Well, we have combined elements of our Counter-intelligence Division, along with our Cyber Division, to address the particular national security threats that the cyber realm poses. But if there were some form of cyber attack—and there have been. I mean, NASDAQ, AT&T—there have been a number of attacks. In every one of our field offices, we have a cyber squad that has the capability of looking at it, investigating the cyber attack and then starting the process of making a determination of the attribution either to a nation-state, an organized criminal group, or to the 18-year-old high school student who has the hacker capabilities. So that squad is the entity on the ground with the capability to start that process.

Then we look at backup in terms of Homeland Security or NSA or others, particularly NSA or CIA, if it looks like it is offshore. So the first persons on the grounds will be the elements of the cyber squads in each of our 56 field offices, but very quickly after that we will bring in additional expertise.

In the meantime, the National Cyber Investigative Joint Task Force that you visited will be monitoring it and passing the information on to DHS, to NSA, to CIA, and others, and the military.

Mr. WOLF. If there were a cyber attack against a company, how soon would that company be told by the FBI that their computers had been stripped or there had been a cyber attack against them?

Mr. MUELLER. I think we would want to alert them at the earliest possible moment to prevent any further damage.

Mr. WOLF. But is there policy in—because I have had some people say, if I had only known earlier. One company was saying it was taking place and had I known—and maybe the Bureau didn't tell us because they were still investigating it, but during that period of time the amount of material that went out the door was pretty amazing.

Is there a formal policy?

Mr. MUELLER. I would have to check. Well, not a formal policy that I know of, but it is like any victim that is being victimized: We would, at the outset, stop the victimization. And I have heard instances—

Mr. WOLF. This company said it was not. Then I asked them to come forward. They did not want to come forward because they respect the Bureau and didn't want to get across the breakers and everything. They said, "Well, you know, I don't think we want to go there." So if they couldn't tell me, then we were not able to pursue it. But I have heard that sometimes it is allowed to go on for a period of time.

Mr. MUELLER. I will check on this.

Mr. WOLF. No, well, I—

Mr. MUELLER. No, we would not let it go on for a period of time as the company continues to lose information without the company's knowledge and participation in monitoring the exfiltration.

Now, we will go to a company and say, "Look, your data is being stolen. It would be tremendously beneficial to us to go online while it is being stolen to identify the persons behind it." But that is with the consent.

Mr. WOLF. Sure. But relatively soon thereafter, they are told?

Mr. MUELLER. Yes, sir.

Mr. WOLF. Okay. The trends are obviously up. The trend is up?

Mr. MUELLER. Yes, absolutely. Absolutely.

DOMESTIC COMMUNICATIONS ASSISTANCE CENTER

Mr. WOLF. Your fiscal year 2012 appropriation included \$12 million for the FBI to address electronic surveillance challenges. Have you established the Domestic Communications Assistance Center that has been described in the last year's budget?

Mr. MUELLER. We are in the process of doing it. It is not operational at this point. We are also looking at the possibility of legislation to assist us in assuring that we don't go dark. And by that, I mean that we are still able, pursuant to court orders, to obtain the communications of individuals for whom we have court orders, to conduct an interception, not necessarily by us but by the communications carrier.

Mr. WOLF. And that would be the Intelligence Committee that would put that in their authorization?

Mr. MUELLER. I believe so.

Mr. WOLF. Okay.

VIOLENT CRIME AND GANGS

You mentioned in your testimony one million gang members. At last year's hearing, we discussed the priority of combating gang violence. At that time, you stated, quote, "I cannot really anticipate any diminished effort when it comes to addressing violent gangs." Well, the fiscal year 2013 budget does just that. Obviously, I don't believe it came from the FBI; I believe it came from OMB. But the administration is proposing to terminate—not cut, but terminate—funding for the National Gang Intelligence Center.

What has changed since last year? Obviously, gangs are still a priority or you wouldn't have raised it. But can you help clarify this? I don't think the committee will go along with that, to be honest with you.

I think a neighborhood that is infested with organized crime or a gang—I once talked to a parent out at a neighborhood in northern Virginia. She basically said she was afraid to send her children

to school, and MS-13 were in the neighborhood. And to that parent, that is an act of terrorism against them.

And so I think to eliminate the office would be a mistake. You agree with that, I take it?

Mr. MUELLER. You are talking about the National Gang Intelligence Center. We will try and cover it elsewhere. We will get the intelligence out. We have built up our intelligence capacity over a period of time. So I know that is what you are discussing.

Mr. WOLF. Well, yeah, but there are a lot of other questions that I will submit. And I am not trying to put you in a—this committee, if my memory serves me, we established it. And—

Mr. MUELLER. I think that is true.

Mr. WOLF [continuing]. My area was heavily impacted. I mean, we had MS-13 people doing horrible things. And no neighborhood, no citizen, whether they have been here for one month in this country or they came over on the Mayflower, ought to be impacted by gang violence. A neighborhood that is controlled by a gang is just wrong. It is unacceptable.

I understand we received a revised version of your testimony late yesterday and that the OMB inserted language making the absurd claim that the elimination of the National Gang Intelligence Center—\$7.8 million and 15 positions—will not hinder the FBI's ability to perform the analytical work done there.

If the Center is eliminated and all gang intelligence is done at the field level, won't the analysis be focused on what is happening in that particular field office?

Mr. MUELLER. Yes.

Mr. WOLF. Will field intelligence officers scattered across the country produce the annual National Gang Threat Assessment that today is done by the Gang Center?

Mr. MUELLER. It will be by the Directorate of Intelligence at headquarters, which will combine the information from the various 56 field offices and the field intelligence groups to produce the assessment.

Mr. WOLF. But are there not other agencies that the gang intelligence—

Mr. MUELLER. There are.

Mr. WOLF. And so, how will they—

Mr. MUELLER. We will incorporate and we will reach out to them to incorporate what intelligence they have that would and should be included.

Mr. WOLF. Well, you know, I just think that will be very difficult. With 1 million gang members—"The National Gang Intelligence Center provides intelligence products that identify international, national, regional, and local gang trends and works with law enforcement and correctional officers at all levels to help them better understand these trends."

Is OMB really claiming that this same level of service to non-FBI entities will continue even after the Center is eliminated?

Mr. MUELLER. I am not familiar with the views.

Mr. WOLF. I don't think anybody would believe that, that it will continue after the Center goes.

Since the proposal to eliminate the Gang Center has become public, I have already begun to hear opposition. I have received letters

from the National Alliance of Gang Investigators' Associations and several State associations. They say the National Gang Center is the only Federal agency that produces in-depth reporting on national gang issues and that the Center's analyses contributed not only to preparedness but also to specific successful prosecutions.

Do you or does the FBI or Justice Department believe, as OMB seems to, that this same level of gang intelligence assistance will continue despite the elimination of the Center?

Mr. MUELLER. All I can say is that we will attempt to reach the same level of capability——

Mr. WOLF. Yeah.

Mr. MUELLER [continuing]. That we had at the National Gang Intelligence Center.

Mr. WOLF. Well, I know you would attempt to. But I think it would be really a mistake to do it. Maybe OMB did it with the idea that they knew that, you know, the Congress would put the money back. But when I see what is taking place down in Mexico, and you referenced that.

Are you requesting additional resources for the Safe Street Task Forces in fiscal year 2013?

Mr. MUELLER. We are not.

Mr. WOLF. No. Okay.

SENTINEL

You had a long struggle to develop and implement the FBI's case management system, Sentinel. Since late 2010, Sentinel has been managed in-house, and a target for deployment was January of this year. That has now been delayed. Why? And when is the new development date? And how firm is that?

Mr. MUELLER. It was my decision to delay it from this last fall for implementation. We did a test; I wanted to make certain that when we put it out there and switch over that it works. What we found in the course of the test—it was several hundreds of users at the same time—is that, while the software appeared to work well, the infrastructure needed to be upgraded. It had not been refreshed in a period of time, to handle the numbers of users that we anticipated.

So, as opposed to moving it forward in September or October, I delayed it until we could get the infrastructure rebuilt. That has been done. We got the additional servers, the switches, and the like in February, and they are undergoing tests now. My expectation is sometime by the end of this fiscal year, summer or fall, we will switch it over.

And I might add that bringing in-house has kept it at the budget line figure that we originally had.

Mr. WOLF. So it will be fully operational in the fall?

Mr. MUELLER. My expectation is yes. Now, when fully operational, there are still some forms that we do have to work on, but it will be used day-in and day-out. We actually have several thousand users use it day-in and day-out now. When I talk about fuller implementation, I am talking about every agent utilizing this particular capability for their everyday work.

Mr. WOLF. What are the differences in what was originally envisioned under the previous contract versus what your new approach is envisioned to deliver within the existing budget?

Mr. MUELLER. Well, one of the problems was that you entered in 2004–2005 into this contract with business practices at a particular level and with the technology at a particular level with a dollar figure. What we came to find is that over a period of time in a contract like this, your business practices change. Our Attorney General guidelines have changed, which requires a difference, a change in the software.

At the same time, technology comes on board that will save you some in some areas of contract. For instance, we originally anticipated that we would migrate all the data from ACS into Sentinel. Well, you don't have to do that now. There are other capabilities that will enable you to take that information you need and utilize it with the Sentinel shell.

So, over a period of time, there have been adjustments in terms of capabilities—enhanced capabilities in some areas, and some other capabilities that aren't as important now but were in the original contract. What we have come up with is, I think, a very effective and efficient case management system given our business practices as modified over the years and utilizing the modern technology.

When we go active on this, summer or early fall, there will still be elements of it that we need to add to, additional capacities. So there will be, as you would have with any software package, a 1.1, a 1.2, a 1.3, a 2.2. It will continue to be improved over a period of time.

Mr. WOLF. If your original program was going to reach 100 percent—this is what you expected, this is what you are going to get out of it—based on the truncated version, where do you think you will get? And I know that is a hard question, but 75?

Mr. MUELLER. No, I think it is above that. But I would really be hard-pressed to say, okay, we had this capacity back then, because we have additional capacities that we did not envision back then that are made possible by the new technology that will jump us forward. So it is really hard to, sort of, make a comparison to what was on the drawing boards 5 years ago.

The one thing that I think that—it wasn't me, it was the people under me that made the decision—we would take it in-house, because after we had the problems with phase two, the sums that were anticipated to finish it off were off the charts. My hope is that we will do it at or about the original contract price, albeit somewhat delayed.

Mr. WOLF. Okay.

The last question is, the IG's comments on Sentinel budget conclude, quote, "Because of uncertainties associated with the decision to extend Sentinel's schedule and the newly planned procurement of additional hardware, we remain concerned about the FBI's abilities to remain within the \$451 million budget, even when including the use of Sentinel's operations and maintenance funds for the development and deployment of Sentinel." So that is—

Mr. MUELLER. I am not going to tell you I don't share that concern. I share that concern. We look at it weekly or every other

week, and I believe it is on track. But in projects such as this, there are always things that jump out at you. So I don't dispute that.

Mr. WOLF. When you leave and you buy a dog, you can name the dog Sentinel.

Mr. MUELLER. I may have come up with that name. But if it is successful, of course I will name the dog Sentinel.

Mr. WOLF. And you can take walks with the former IG. Okay.

Mr. MUELLER. I mean, that is what the IGs do; they raise concerns.

Mr. WOLF. I know. I know. Well, I thought the former IG raised some concerns, but I think, in the raising, I think it was almost sometimes more "gotcha" than it was cooperative, I felt at times. But I think it is important, and I think it is—you know, let the committee know. And, you know, we have a report required here on March 17th, which I guess has been overtaken by events.

Mr. MUELLER. I would have to check on that.

Mr. WOLF. Okay.

CENTRAL RECORDS COMPLEX

The Bureau has been trying for many years to construct an FBI central records complex. The committee has supported your efforts to centralize and automate records so agents and analysts can better share information. Last year, funds were requested by GSA to fund the construction of an FBI central records complex. However, that funding was not included in the fiscal year 2012 omnibus.

Why is this facility needed? And are there other options besides going through GSA, since they don't have the money?

Mr. MUELLER. Well, let me just recount again. We are an information agency, and a number of entities depend on us for providing swift information. We have records in 400 separate locations around the country. We have already digitized something like 162 linear miles of records to make them much more accessible.

The records complex is necessary for us to do our job better, have not just the digital records but also the paper records that we periodically need to go into a central location. And it is also important because we are required to do records checks and FOIA responses. For those persons who rely on us having access to those records, the CRC, Central Records Complex, has been something that, since I have been here, I have sought as tremendously important for the Bureau.

Mr. WOLF. We understand that you currently have balances from prior-year appropriations on hand that you have allocated for the project. How much have you allocated? And if you were to construct the building on your own, how much additional funding do you believe you would need to proceed with the construction plan?

Mr. MUELLER. Well, I know we have approximately \$100 million that was set aside for this. And I would have to get back to you on the other figures.

I know we are looking at several sites. The agency that locates sites has given us several, and we would like to push ahead with the construction and identification of the final site.

Mr. WOLF. Okay. If you can have your staff work with the committee, we will have some questions.

Mr. MUELLER. Yes, sir.

EXPLOSIVES INVESTIGATIONS

Mr. WOLF. In 2011, GAO identified explosives investigations as an area of duplication and overlap. In their follow-up report, GAO has determined that the Department has addressed their recommendations.

Can you bring us up to date on how you have resolved the overlap with the ATF in the area of jurisdiction, training, labs, and other things like that?

Mr. MUELLER. The principal issue was response to the crime scene. That is where you had the most confusion.

Under the deputy's office and resolving it with both ourselves and ATF, we determined that anything that conceivably looks like it has a relationship to terrorism will be handled by us.

If it is clear from the outset that it does not relate in any way to terrorism or a potential terrorist attack, then it will go to ATF. Or in the course of our investigation if it looks like it may have been a terrorist attack but turns out not to be, then quite often it will go to ATF.

Mr. WOLF. And how quickly is that decision made?

Mr. MUELLER. I speak every week or every other week to our special agents in charge, and one of the questions I have is, how are we getting along with ATF in terms of the allocation of responsibilities? And I haven't heard in the last probably 6 months, a year, any concern about the issue.

Mr. WOLF. Well, how quickly would a decision be made—I know it varies—

Mr. MUELLER. When the call comes in. If there is a bomb that is found in a heavily trafficked mall, you don't know what it may be but you would assume that it is terrorism at the outset. We respond, ATF would respond, but we would be in charge of the scene.

If it turns out that it is a disgruntled husband, wife, or something like that who has a pipe bomb and that has no relationship to terrorism, quite often it would go to ATF. But you just don't know at the outset.

Mr. WOLF. So the guidelines now you think are good?

Mr. MUELLER. Yes, I think they are good. I think they take care of the equities. And my concern throughout was that there are a number of things that happen if it is a terrorist attack, and we have the capabilities in our lab and in our 56 field offices to respond immediately—some of the capabilities that ATF does not have. We have had cases in the past where other agencies would move with it for a period of time but handled it differently than we would and perhaps lose some of the forensics evidence that we may have been able to get if we had been there at the outset.

Mr. WOLF. So it is not a question of savings. Have there been any savings, financial savings? It has more been a policy issue of investigation?

Mr. MUELLER. I am not certain there are any real savings. I mean, because there is clarity now as to who goes to the scene, there may be some modest savings in terms of either ourselves or ATF not responding to every scene, as had been the case in the past.

Mr. WOLF. Okay.

Mr. Graves, do you have any questions?

Mr. GRAVES. Yes, sir. Thank you, Mr. Chairman.

CYBERSECURITY

Director, I know earlier that you had made some comments in regard to cybersecurity and some of the websites out there. Can you help us or maybe go a little bit deeper into what the process is? The Department deems a website as something that needs to be taken down or taken over. What is the process, the due process of that? And how do you try not to impact sites that really were not the intended targets in the first place of the agency there?

Mr. MUELLER. Well, to the extent domestically that there are sites that we believe are maintained for criminal purposes, to the extent that we want to address that, we will go through a court and get a court order enabling us to substitute servers and the like. We have done this in botnet cases and the like, but we will do it with court authority.

Overseas, you don't have the First Amendment, often. So those who operate overseas, not ourselves, would have different protocols in terms of taking down sites.

Mr. GRAVES. And are there cases in which innocent sites are taken down or impacted? And if so, what is the remedy for them?

Mr. MUELLER. Well, go to court. If there is some belief that the Federal Government, whether it be ourselves or others, has taken down a legitimate site, then the response would be, come to us and say, "Hey, we are legitimate." We would try to accommodate them. But if there was a disagreement and we believed that the site was appropriately taken down, perhaps with a court order, then the persons who maintained the site could go to court.

Mr. GRAVES. And I guess to bring it to that point of where you seek a court order to do that, is it something that—do you have a team, a cybersecurity team, that is seeking out these criminal sites? Or is it something that is brought to your attention from consumers or other folks? Or how do you—

Mr. MUELLER. Oh, no. It is like developing intelligence to prevent a terrorist attack. We will identify those sites. We will investigate and develop intelligence. To the extent that we can prove a criminal violation, we will, not just with ourselves but working with our counterparts overseas, take it to the prosecutors, have an indictment, conviction, and sentence, and attempt to identify and prioritize those sites that we think are most dangerous.

DECISION TO USE LETHAL FORCE ON A U.S. CITIZEN

Mr. GRAVES. Right. Well, thank you.

And if I could just get your thoughts on some comments that the Attorney General made this week. He was speaking to a university and made the comments about how his department or other departments had the ability to make the decision to kill a U.S. citizen if suspected of terrorist activity.

And he said there was sort of a three-part test in which I guess he went through or whomever makes that decision. What role does your agency have in that decision-making?

Mr. MUELLER. Our role would be limited to providing the evidence on the particular individual based on our investigation. It may well be based on intelligence and information that is provided by the intelligence community in addition to whatever we might have provided.

Mr. GRAVES. Is this something new, or has this been practiced in the past? Is it common practice, or is it—

Mr. MUELLER. May I ask what—

Mr. GRAVES. The three-part test that he outlined or the activity that took place. I mean, is it something that has occurred in the past?

I mean, when he made the comments, it was somewhat of a revelation, I think. A lot of folks had been asking about this; there had been really no public comment from the President or the administration. And so it was new, in the way he had displayed it and brought it to light.

Is that something that has been common practice in the past?

Mr. MUELLER. Well, I can't speak to the legal analysis that I think he went through in the course of the speech that he gave.

What I can say is that our role has been to provide to prosecutors and to policymakers the information and evidence we may have on the illegal activities of an individual who has or is contemplating terrorist acts. Then depending on a number of factors, there is a range of responses that may be appropriate, whether it be in the law enforcement arena or the defense arena.

Mr. GRAVES. And then lastly, thinking about the three-part test that he mentioned, does that only apply to a U.S. citizen that is overseas, or does that apply to a U.S. citizen that is here?

Mr. MUELLER. I would have to go back. I am not certain whether that was addressed or not.

Mr. GRAVES. Okay. So I guess, from a historical perspective, does the Federal Government have the ability to kill a U.S. citizen on United States soil or just overseas?

Mr. MUELLER. Again, I am going to defer that to others in the Department of Justice.

Mr. GRAVES. Okay. Thank you, Director.

Thank you, Mr. Chairman.

Mr. WOLF. Mr. Honda.

Mr. HONDA. Thank you, Mr. Chairman.

And I appreciate your—I am not sure what the word is—your reservoir of energy in going through a couple hours of questioning. But I wanted to ask two questions.

PROHIBITED FIREARMS PURCHASERS

You know, 2011 was a pretty difficult year and unusually violent for law enforcement officers since many of them have been killed by firearms. There is probably about a 10 percent increase over the previous year, 2010.

The firearms that were used by the alleged shooters in these cases of law enforcement agents, law enforcement officers that have been murdered by these folks, do we know or do you look into these cases to see whether a prohibited firearm purchaser was involved in it?

And if not, are you aware of any division of the Department of Justice that would be investigating the backgrounds of these shooters—you know, whether they went through a background check or not?

Mr. MUELLER. I think that is the type of thing that we are, at least, and, if not we, others would do in terms of all the conceivable data relating to the death of a police officer, including whether the shooter was a prohibited person or not. I am just not familiar with what has been done with that data, where it exists, and what you can tell from it. But we can get back to you on that.

Mr. HONDA. Yeah. It is of interest to me because gun shows allow certain purchasers to purchase firearms without going through a process. And then there are those who are prohibited firearms purchasers also. So, in terms of the issue, I would be interested in that data.

IMPACT OF LOCAL BUDGET CUTS/TASK FORCE PARTICIPATION

On the issue of resources, I know that a lot of the local law enforcement agencies, especially in the Bay Area, San Francisco Bay Area, that work with you on the gang and gang-related drug task force, one of the long-term consequences of budget cuts at all levels is a serious lack of capacity at our local and State and Federal agencies in being able to respond to threats. In California, it has resulted in special units or joint ventures being considered a luxury when the police department is having trouble even with taking calls, 911 calls.

So, since the FBI has a role in monitoring crimes and looking at the future of our national response to criminal threats, what kinds of effects do you believe are occurring, that the cuts at the local level are having and the cuts that you are experiencing are having also?

Mr. MUELLER. Well, one of the concerns we would have, given the economic climate and the cuts to police departments, is that there would be a withdrawal of officers from the various task forces that we have—Safe Trails, Safe Streets, gang task forces, and the like.

I must say, around the country, we have seen very little of a withdrawal from those task forces or, for that matter, the Joint Terrorism Task Forces. I believe that is because most police chiefs think they can leverage their personnel on the task forces as opposed to making better use of that person back with the police force.

In many of these task forces, you may have one or two police officers from a particular entity that leverage the resources the task forces bring to the problem from other Federal agencies and other State and local agencies far more than the police Department itself can bring to the problem.

Mr. HONDA. Sure.

Mr. MUELLER. So the participation in the task force gives them access when there is a particular threat—it may be a particular homicide or set of homicides or a longstanding gang—and gives them resources they otherwise would not have. I think that, in part, explains why we have not seen a number of police departments draw back more of their personnel from the task forces.

Mr. HONDA. Okay. So it sort of speaks to how well we can invest some of our scarce resources at this level so that we can extend that or create that synergy and the efficiencies that we would be looking for to combat gang crimes and things like that.

So any information that you could generate for us at the appropriation level that would be helpful for us to be able to sustain and support that, I would like to see happen for your department.

Mr. MUELLER. Well, I have always been a great believer in task forces. And I do believe that, as Federal funds go to State and locals, there should be mechanisms of tying it to cooperation between the Federal authority as well as State and local law enforcement, so that in the budget process there are incentives to work together on task forces.

Mr. HONDA. Okay. Thank you.

Thank you, Mr. Chairman.

LEWC REORGANIZATION

Mr. WOLF. The Department's budget request eliminates the separate appropriation account for inoperable radio systems and improvements for all DOJ law enforcement components and instead requests all that money under FBI salaries and expenses accounts.

What new responsibilities would this place on the FBI?

Mr. MUELLER. My understanding is, we have for a number of years, labored under inadequate modernized radio capacity. It is our responsibility for those entities within the Department of Justice to come up with recommendations and a package that would modernize our radio capabilities.

We have an engineering facility. I think the perception is that we have the capabilities within the Bureau to make this happen, given our engineering capabilities and perhaps also some of our internal administrative processes. So we have undertaken to do this.

Mr. WOLF. Okay. Well, in addition to funding for operations and maintenance of current radio systems, the fiscal year 2013 request includes \$10 million for radio systems modernization that you just referenced. Modernization has been previously viewed by the Department as a project costing over \$1 billion over many years. No funding was requested or provided in fiscal year 2012.

Since it appears that the full modernization project has been abandoned, what would the \$10 million buy in fiscal year 2013? And why is that more important than counterterrorism, gangs, cyber—none of which receive any additional funds?

Mr. MUELLER. Well, having encrypted radios, for instance, is absolutely essential to the work that we do on the streets. Any agent or surveillance person will tell you that one of the essentials that we have, whether it be in national security or otherwise, is the necessity for surveillance. And we need upgraded radios.

Now, \$10 million is going to be a drop in the bucket, and what I hope to come up with is a way forward. I understand the sums that you have given us, but we desperately need those radios, and we would like to come up with a way forward. And that will include funding down the road.

Mr. WOLF. Okay, so it would be more ideas than it would be actual implementation?

Mr. MUELLER. Not in my mind. It is beyond ideas. We need them. We need them now. We need a way forward. We need a plan to get there and be able to tell the Department, OMB, and yourselves what it is going to cost and with a plan that is effective, efficient, and will get us those radios.

Mr. WOLF. Okay.

HUMAN TRAFFICKING

In the fiscal year 2012 bill, Congress directed you to increase activities related to the investigation of severe forms of trafficking in persons.

Have you increased the resources devoted to trafficking? And what are the trends in terms of the caseload and types of cases you are finding?

Mr. MUELLER. Over the last year, we have had substantial take-downs when it comes to human trafficking. I would have to get you the specific additional numbers we have that we have put on that, but we have made a substantial dent. But, again, in terms of the figures and the prosecutions we have had and successful investigations over the last year, I would have to get back to you on that.

[CLERK'S NOTE.—Information provided subsequently by the Bureau indicates that in fiscal year 2012, as of June 26, 2012, the Bureau recorded the following statistics related to human trafficking investigations and prosecutions: 147 arrests; 104 informations/indictments; 81 convictions; 77 agents working human trafficking; 191 investigations initiated; and 412 cases pending.]

Mr. WOLF. Well, the committee directed you to report by March 17th on agent utilization and overall staff resources dedicated to trafficking. Are you on track to complete the report? And can you give us an idea of how your current trafficking resources compare to previous years and what results you are seeing from these investigations?

Mr. MUELLER. Let me check on one thing, if I could.

The answer is, yes, the report will be coming up soon.

Mr. WOLF. Okay. Do you have any idea of what results you are seeing?

Mr. MUELLER. I have not reviewed it.

Mr. WOLF. Okay. We also put language in that every U.S. Attorney has to have a task force. I would assume that the FBI would be part of all those task forces.

Mr. MUELLER. I would presume.

Mr. WOLF. Do you know if they have actually—

Mr. MUELLER. I don't know. I will have to check on that.

Mr. WOLF. Could you check on—

Mr. MUELLER. Yes, we will. Absolutely.

Mr. WOLF [continuing]. Whether any U.S. Attorney has asked anyone in the FBI to participate?

Mr. MUELLER. I will follow up on this.

Mr. WOLF. This is an important issue. There are people's wives, daughters, sisters being trafficked. It is a modern-day slavery. I mean, you saw the movie, I hope, William Wilberforce. We abolished the slave trade; now we have modern slavery in northern Virginia. When I looked at some of the places—and the very thought

that someone's sister or daughter would be in those places. So you ought to go after these places. This is bad. And, you know, I—

Mr. MUELLER. And we have.

Mr. WOLF [continuing]. Sense there has not been really a commitment at times. And the Attorney General said he was committed, and I believed him. But I think—well, I have heard rumors that a lot of U.S. Attorneys are saying, you know, “What are we doing on this thing? This is not our priority.” I mean, the language has asked everyone to set up a task force, and we expect that they would, but we also expect that the FBI would be a major participant in it.

Mr. MUELLER. We are, and we have task forces that have addressed it before, even before the funding that we got in 2012.

I also know you sent us a letter maybe a year ago or so with information on a number of entities in the area. We followed up on that, followed up with the entities that—I don't want to describe it here, but information that had been provided.

I take it exceptionally seriously. And I can tell you, the agents and the analysts and others who work in this area do it day-in and day-out, and they are absolutely dedicated to eradicating human trafficking in all the various forms that you articulate.

Mr. WOLF. Okay. Well, if you could tell us how many of the U.S. Attorneys in their task force that they have all been told to set up and the Attorney General said he would agree with, how many have asked you, the FBI, to participate and how many have.

Mr. MUELLER. I will have to get back to you.

Mr. WOLF. Okay.

[CLERK'S NOTE.—Information provided subsequently by the Bureau indicates that the FBI participates in 32 Bureau of Justice Assistance Human Trafficking Task Forces and six Anti-trafficking Coordination Teams (ACTeams). For more information on U.S. Attorneys participation, see the Question for the Record submitted by Chairman Wolf included in this volume at the end of the Attorney General hearing transcript.]

CHINESE ESPIONAGE

Over the last month, *Washington Times* national security reporter Bill Gertz has done a number of articles on the Chinese espionage operation that, “uses a private exchange program for retired U.S. and Chinese generals to influence the U.S. Government and downplay Beijing's large-scale military buildup.” This was according to a recent U.S.-China Economic and Security Commission report.

Is the FBI aware of the U.S.-China Economic and Security Commission report?

Mr. MUELLER. I had not heard of it. You mentioned it; now I would have to go back and see whether we have any knowledge of that particular entity.

Mr. WOLF. Okay, well, I tell you what, can you send your top person up—

Mr. MUELLER. Sure.

Mr. WOLF [continuing]. Who is involved in it? And then we will bring the U.S.-China commission in, which I serve on, and their staff and your top people to sort of look at it—

Mr. MUELLER. We could do that, yes.

Mr. WOLF [continuing]. Rather than us going into it here.

I think that is—there are several others which I think we will just submit for the record. Let me just see if there are any that I— one thing I wondered at the outset, during the 1980s, I was involved with a group called the Jamestown Foundation, and there were many defectors. I don't know if you were not in town then. Bill Geimer, you remember Bill Geimer? He had been Assistant Secretary of State.

The Jamestown Foundation was set up to be a place that welcomed defectors from the former Soviet Union, and Poland. The Polish Ambassador, Spasowski, walked out of the Polish Embassy, walked into the White House, and President Reagan—who I think was one of greatest Presidents we have ever had, who understood this freedom issue—welcomed him in.

When I would talk to the defectors, they would tell me, in working with people, they liked to work with FBI agents. They felt very comfortable. Actually, they said they would rather work with the FBI than they did the CIA.

I never hear of defectors anymore. I mean, maybe we should—

Mr. MUELLER. I can't answer the implied question. I am not certain what the story is.

Mr. WOLF. Well, you know, I don't want to put you on—could you have someone come up to tell us whether or not there are still the efforts with regard to defectors—

Mr. MUELLER. Yes.

Mr. WOLF [continuing]. Coming in, whether they be high-level officials in X, Y, Z government coming in? We have had—you know Pacea?

Mr. MUELLER. I have heard the name, yes.

Mr. WOLF. Pacea was head of the Romanian intelligence. He came in, gave us tremendous information. We had different people. I never hear about it. It seems that there is almost—in the 1980s, they were defecting left and right. And I never hear it. And I just wondered if the program has maybe—

Mr. MUELLER. I actually should defer to other agencies on that particular aspect. Although we play a role with defectors, in terms of interrogation and the like, yes.

Mr. WOLF. I mean, the defectors that I talked to said they would much rather deal with the FBI than deal with the CIA.

Well, maybe whoever is involved in that program in the FBI can come up and explain to us what is currently being done.

Mr. MUELLER. We would be happy to do that.

Mr. WOLF. And maybe—

Mr. MUELLER. Can't do it in open session, quite obviously.

Mr. WOLF. I understand.

I think that is—we will just submit the rest of the questions.

Again, I want to thank you. I want to thank your wife. But I think you have really done a great job.

And I also want to thank the men and women that work at the Bureau. When I hear different things and knowing what you all have done—and it is one of those things, as I said earlier, people will never know the lives that were saved and things that didn't happen because of people that work for the agency and work for

other places that have done. So I hope you will go back and thank the men and women of the Bureau——

Mr. MUELLER. I will do that.

Mr. WOLF [continuing]. For the job and the service to the country.

And unless Mr. Serrano or Mr. Graves has a question the hearing will be adjourned. Thank you very much.

Mr. MUELLER. Thank you.

QUESTIONS FOR THE RECORD—MR. WOLF

STIMULUS FRAUD

Question. A major activity of your White Collar Crime program is the investigation of fraud related to the \$787 billion provided in the 2009 Stimulus bill. Your budget document states that “the FBI has already seen examples of how stimulus funding has resulted in a myriad of fraudulent schemes.” The Stimulus bill included almost \$16 billion under the jurisdiction of this Subcommittee. Can you give us some examples of stimulus fraud that you have seen? Where are the general areas of vulnerability to fraud in these programs? And how many active stimulus fraud cases do you have?

Answer.

General Areas of Stimulus Fraud Vulnerability.—The receipt of stimulus funds by government agencies at the local, state and federal level can lead to a variety of fraudulent activities. For example, public officials with the authority/capacity to obligate the funds are uniquely positioned to extort bribes from government contractors in return for issuing government contracts and potential government contractors/vendors may seek to bribe public officials in return for the issuance of government contracts. In addition, public officials may falsify contract documents or otherwise manipulate contracts for personal benefit. Some frauds may have been accomplished under the provisions of the American Recovery and Reinvestment Act (ARRA) related to the expedited obligation of funds for stimulus projects.

Under these provisions, state and federal agencies were required to identify specific projects ready to start within 90 days and to expend the funds within 120 days, and this expedited processing may have led to reduced administrative oversight. For example, public education—one of the largest recipients of ARRA funding—can be vulnerable to corruption and fraud. Funding and contracts for public schools are typically managed by an independent board with full spending authority and minimal or no oversight, leading to opportunities for corruption and fraud. Vulnerabilities associated with the use of ARRA funds may be found in funding increases for existing programs, as test scores or other performance measurements are fraudulently adjusted to qualify for funding.

Examples of Stimulus Fraud.—

- The FBI conducted an investigation of a county commissioner in charge of Stimulus Funds following allegations the commissioner issued contracts to businesses in exchange for bribes. He was convicted of bribery, mail and wire fraud, and conspiracy.
- The former president of Park Avenue Bank attempted to fraudulently obtain millions of TARP funds. He pled guilty to this scheme.

- In 2011, more than a dozen co-conspirators were charged in a collaborative multi-agency investigation. The group was charged with committing various crimes arising from their abuse of the Federal Government's stimulus program by filing false tax returns after obtaining identity information from third parties under false pretenses. The information was used to create false W-2 forms for a fictitious company and resulted in the subjects obtaining approximately \$1 million in stimulus-funded first-time homebuyer tax credits between 2008 and 2009.
- A former Director of a local county Department of Housing and Community Development was charged with accepting bribes in return for awarding over \$4 million in federal HOME funds, a block grant administered by the Department of Housing and Urban Development. In 2011, he pleaded guilty to conspiracy to commit extortion.
- Two asbestos removal contractors in Michigan pleaded guilty to conspiracy to bribe a public official, stemming from a \$10,000 bribe they paid a city manager to influence the award of a Neighborhood Stabilization Program contract. The total intended fraud was approximately \$300,000.

Table 1: Total Pending Stimulus Fraud Cases (as of 03/20/2012)

Year	Cases
2010	70
2011	84
2012	147

COMPUTER INTRUSIONS

Question. Your FY12 appropriation included an increase of \$18.6 million to investigate computer intrusions, including making your National Cyber Investigative Joint Task Force a 24-7 operation. Is the NCIJTF now operating 24-7?

Answer. The FY 2012 Appropriation included positions and non-personnel funding for contract analysts to enable the NCIJTF to operate 24 hours a day, 7 days a week. Since the appropriation passed, the FBI has been actively working to hire the necessary FBI personnel, coordinate with other government agencies, and establish the required contracts to staff the facility on a 24x7 basis. The FBI recently received concurrence from the House and Senate Appropriations Committees on its FY 2012 Spending Plan and therefore anticipates being able to begin 24x7 operations by the end of 2012.

Question. The increase was also intended to reduce the backlog of digital forensics cases by one-third. What is the current backlog and are you on track to achieve that backlog reduction?

Answer. From January 20, 2011 through February 29, 2012, the Computer Analysis Response Team's (CART) backlog has decreased by 17 percent and currently stands at 1,201 requests (as of March 2012). As new Examiner personnel are hired and trained, it is expected that they will contribute significantly in addressing the backlog. The CART Program is also working to streamline the training and certification curriculum, allowing new Examiners to process/examine data incrementally as they are trained rather than requiring the full certification training of approximately 12 months before processing data. The training initiative also provides technician-level training, which allows a broader FBI population to handle the less technically challenging requests.

Question. How would a cyber attack with national security implications be investigated at the field level? Do you have cyber squads that specialize in national security cases in each field division? And if not, would that make sense in light of the caseload, and the importance of the cases?

Answer. Over the past several years, the FBI has developed substantial expertise to address the cyber threat. This expertise resides both at the NCIJTF as well as in each of the FBI's 56 Field Offices. The FBI has cyber squads in each field division, which specialize in national security cases as well as other cyber cases. The personnel on the cyber squads receive specialized training so that they can address national security cyber threats as well as criminal cyber issues. The FBI now has more than 1,000 specially trained Agents, Analysts, and Forensic Specialists who can address cyber issues. Depending on the circumstances involved in the intrusion, the FBI could use any of these resources to address the threat.

Additional details can be provided in a classified setting.

ELECTRONIC SURVEILLANCE CAPABILITIES

Question. Your FY12 appropriation included \$12 million for the FBI to address electronic surveillance challenges. The Department has proposed using a portion of this funding to reimburse other DOJ entities for their participation in these efforts. How much of the \$12 million is going out to reimburse other agencies? Is there money in your request to continue reimbursing other agencies in FY13? If so, how much? Or are the costs of their participation built into their own budgets?

Answer. The formation of the Domestic Communications Assistance Center (DCAC) was approved with the passage of the FY 2012 Appropriation, which specifically identified funding and positions for the DCAC. However, \$4.5 million requested by other DOJ agencies (ATF, DEA, and USMS) to fund positions to support their respective roles in the DCAC was not appropriated as requested for FY 2012. Given the importance of having other DOJ component agencies represented in the DCAC, the FBI plans to use appropriated funding to establish reimbursable positions. The amount available to reimburse other agencies depends on costs of the facility required to house the DCAC. The FBI expects the DCAC facility will be operational by the end of calendar year 2012. Upon establishment of the DCAC facility, other DOJ component agencies will assign personnel through reimbursement agreements with the FBI. The FBI currently anticipates reimbursing five positions from the DOJ component agencies at an annual cost of approximately \$1.2 million. This level of reimbursement would continue in FY 2013 for DOJ component agencies to maintain participation in the DCAC. However, the ultimate number of positions is dependent upon the operational costs associated with the DCAC and will be determined by the DCAC IOC and working groups.

SENTINEL

Question. Are you still planning to finish the Sentinel project within the current project budget of \$451 million? And have you used money from the operations and maintenance budget to supplement development? If so, how much?

Answer. The FBI is still planning to finish the Sentinel project within the current projected budget of \$451 million. The current anticipated total cost of Sentinel through the Go-Live transition is \$441 million, or \$10 million under budget. However, should testing prove that the deployment of the Sentinel application onto the refreshed infrastructure requires mitigation due to an as-yet-unknown operational risk; the \$10 million may be required to implement a corrective action option. Additionally, the FBI has not used money from the operations and maintenance budget to supplement development.

Question. The Inspector General continues to monitor progress on SENTINEL. The latest report from December indicated that performance problems were stemming from insufficient hardware capacity and that new hardware purchases would be necessary for proper operation. Has that hardware been purchased and installed?

Answer. On October 6, 2011, the FBI conducted a nationwide Sentinel Functional Exercise with more than 700 employees. This exercise proved invaluable because it allowed the field to have hands-on experience with the application and its available functionality. Furthermore, it helped leadership determine that although the application was well-received, the equipment used to support Sentinel required a refresh. In January 2012, the FBI ordered the new hardware to accommodate the Sentinel application and it is currently in the process of being installed.

Question. How much will the hardware cost, and does that add into the overall project development cost?

Answer. The Sentinel application purchased new hardware for \$6.2 million due to previously acquired hardware nearing the end of its useful life. It was appropriate to assign this cost to the Sentinel operations and maintenance recurring budget and not to the overall project development costs as it was in line with equipment refresh as a function of O&M.

QUESTIONS FOR THE RECORD—MR. ADERHOLT

FBI TRAINING DOCUMENTS

It has been reported that the FBI recently purged its training documents based on “inaccuracies and other problems” in the descriptions of Muslims.

Question. Please tell the Committee what process was used for the review of the documents?

Answer. In September 2011, the FBI assembled a team to conduct a detailed review of over 160,000 pages of training materials to identify any inappropriate documents or presentations. As part of this review, the FBI developed “guiding principles” for the standards to be applied in reviewing documents, as well as for determining appropriate training in the future. The guiding principles were used in conducting the review. After an exhaustive review, the team identified 876 documents that did not adhere to the guiding principles. The 876 documents were either edited or removed from circulation so they could no longer be used during presentations or training.

Question. What individuals and/or organizations had input in making these decisions? Who decided what individuals and/or organizations were involved? Were others invited to participate or specifically excluded?

Answer. The review team was led by an FBI Inspector. The team consisted of 25 personnel from the FBI’s Inspection Division, and a five-member panel of subject matter experts (SMEs), identified and selected by the FBI. Three

of the SMEs were from outside the FBI but were affiliated with the U.S. Government. All the SMEs are recognized as experts on Islam based upon extensive training, academic, and/or practical backgrounds in relevant fields of study.

Question. Were the trainers allowed to participate in the review? If so, specifically what role did they play?

Answer. Although those who developed and/or presented material that was deemed by the review to be inappropriate did not participate in the review, a majority of the presenters were interviewed after the review to discuss why the material was removed from circulation.

QUESTIONS FOR THE RECORD—MR. HONDA

FBI INTERVIEWS OF MUSLIMS

Director Mueller, it has been reported to me that during volunteer interviews with Muslims, your agents often ask questions about First Amendment activities. Some of the more troubling reported questions include: What mosque do you go to? Who is the imam (prayer leader)? What do you think about him? How many times a day do you pray? Who else goes to the mosque with you? Which Islamic scholars do you follow?

Question. Can you help me understand how such questions, which appear to strike at religious devotion rather than violent extremism, help identify threats to our nation?

Answer. Inquiries by FBI agents are not intended to determine the religious devotion or question the religious practices of those being interviewed. Interviews conducted by law enforcement during any investigation require the agent to ask questions that provide context for the individual, allowing the agent to better assess the interviewee. FBI interviews do not routinely include the questions referenced above, but without knowing the context in which such questions might have been asked or specific instances in which these questions were posed, we are unable to address how they might have contributed to a particular investigation. Pursuant to FBI guidelines, the FBI does not infringe upon the First Amendment rights of persons it interviews.

FIREARMS TRAFFICKING

As you know, there is currently no federal statute that criminalizes firearms trafficking. Instead, traffickers are often prosecuted under 18 U.S.C. 922, which prohibits “engaging in a firearms business without a license.” Last July,

ATF agents testified before Congress about the need for a federal firearms trafficking statute and stiffer penalties. They told the House Government Reform Committee that a dedicated firearms trafficking statute would give ATF agents the ability to go after traffickers directly who divert firearms from legal to illegal commerce activities.

Question. Do you agree that a federal firearms trafficking statute would be helpful in significantly disrupting firearms and drug trafficking in the U.S. and along the U.S.-Mexico border?

Answer. The FBI defers to the Department regarding the value of a federal firearms trafficking statute. However, the FBI shares the Attorney General's view that disrupting the dangerous flow of firearms along the Southwest Border and putting an end to the violence that has claimed far too many lives are, and will continue to be, top priorities. In pursuit of this goal, the FBI will continue to exercise the full scope of our statutory authority to investigate and dismantle the criminal organizations that traffic in weapons and drugs, and are involved in the commission of violent crimes. In many instances, the FBI has primary jurisdiction for enforcement of the relevant statutes; however, the primary investigative jurisdiction for enforcement of the National Firearms Act and the Gun Control Act rests with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The FBI's jurisdiction for enforcement of these statutes is secondary and premised on the connection to a violation within the FBI's primary investigative authority.

MORTGAGE FRAUD

From my understanding of the recent 49 states mortgage settlement, the federal government did not provide immunity for mortgage servicers who committed criminal violations.

Question. Can you tell me if this means the FBI will continue its investigations against mortgage servicers that illegally foreclosed on homeowners? If so, is it possible this information will be turned over to the US Attorney's Office for possible litigation?

Answer. The above referenced mortgage settlement agreement will not affect the FBI's pursuit of criminal violations against mortgage servicers with criminal exposure in the foreclosure process. This agreement, which was a joint federal-state civil settlement entered into with the nation's five largest loan services, was focused on providing financial relief to homeowners and establishing significant new protections for homeowners going forward. The agreement does not, and will not, prevent the FBI from pursuing investigations

against individuals and entities in the mortgage industry that have violated federal criminal statutes.

SERVICEMEMBERS CIVIL RELIEF ACT

It is reported that over 5,000 foreclosures of servicemembers are being investigated for being in violation of the Servicemembers Civil Relief Act (SCRA). Previously, Bank of America, JP Morgan and Morgan Stanley have all admitted to wrongfully foreclosing on veterans in violation of the SCRA, and have agreed to pay fines. As I understand it, beyond the civil remedies available, each violation of SCRA represents a criminal misdemeanor offense which is punishable by a sentence of up to one year of imprisonment. Responsibility for SCRA falls within the jurisdiction of the Department of Justice.

Question. Is the FBI pursuing its investigations against those servicers who have violated the SCRA beyond the civil remedies? In your opinion, should the U.S. government, or the state attorneys general, pursue the remedies available to them under the SCRA when it comes to criminal penalties? In your opinion, do civil sanctions alone represent an acceptable remedy?

Answer. The Department of Justice, Civil Rights Division, Housing and Civil Enforcement Section is responsible for enforcement of the SCRA. Currently, the FBI does not have involvement in violations of the SCRA under the criminal misdemeanor aspect of the statute. If evidence were developed indicating willful violation of the SCRA in which criminal sanctions may be appropriate, the FBI would work with the Department of Justice to determine whether investigation by the FBI is appropriate.

RESIDENTIAL MORTGAGE-BACKED SECURITIES WORKING GROUP

In January, the Attorney General announced the creation of the Financial Fraud Enforcement Task Force's Residential Mortgage-Backed Securities (RMBS) Working Group. The new Working Group has been assigned 10 FBI agents and analysts. During the Savings & Loans crisis of the 1980s and 1990s, which was much smaller, there were roughly 1,000 FBI agents involved in the investigations.

Question. Do you believe that 10 FBI agents is an adequate amount for, in the Attorney General's words, "investigating the financial misconduct—and, specifically, misconduct in the market of mortgage-backed securities—that contributed to our nation's recent economic crisis?" How do you justify 1,000 FBI agents for investigating the S&L crisis, and only 10 FBI agents for investigating the recent crisis dealing with mortgage-backed securities?

Answer. In January 2012, the Attorney General announced the creation of the Residential Mortgage-Backed Securities (RMBS) Working Group, which included the assignment of 10 FBI agents and analysts. These 10 personnel contribute to the Working Group's effort to assess the failed collateralized debt obligations identified by the RMBS Working Group for potential criminality and to ensure they are resourced accordingly by the FBI. The stated purpose of this working group is to assist state and federal law enforcement offices in achieving justice for the victims of misconduct relating from the creation, sale, and ultimately, the failure, of RMBSs.

In addition to the resources assigned to the RMBS working group, in FY 2011, approximately 900 Special Agents and approximately 100 non-agent accountants worked more than 11,000 criminal cases focused on the violations contributing to the RMBS crisis. These cases led to approximately 1,600 convictions and \$11.6 billion in fines, recoveries, and restitutions. This level of resources dedicated to RMBS-related violations is similar to the level of investigative resources dedicated to the S&L crisis.

TUESDAY, MARCH 6, 2012.

BUREAU OF PRISONS

WITNESS

CHARLES E. SAMUELS, JR., DIRECTOR, BUREAU OF PRISONS

OPENING STATEMENT—MR. WOLF

Mr. WOLF. I am sorry we are late. We had a vote and then there was a ceremony for the passing of Congressman Donald Payne, and so I do apologize. I am just going to skip the opening statement in the interest of time because we have a lot of questions. And Mr. Serrano, do you have anything you want to say?

Mr. SERRANO. No. Just welcome and I join you in saying that we can skip the opening statement because we are short on time.

Mr. WOLF. Your full statement will appear in the record and you can summarize as you see fit.

OPENING STATEMENT—MR. SAMUELS

Mr. SAMUELS. Good afternoon, Chairman Wolf, Ranking Member Fattah, and members of the subcommittee. It is a pleasure to appear before you today to discuss the President's fiscal year 2013 budget request for the Federal Bureau of Prisons.

Although this is my first appearance before this subcommittee as Director of the BOP, I have been with the Bureau for nearly 24 years, having started as a correctional officer and then holding many positions including warden, senior deputy assistant director, and assistant director.

Continuing increases in the inmate population pose ongoing challenges for our agency. In fiscal year 2011, the inmate population increased by 7,541 net new inmates which was approximately 88,000 inmates being admitted and 80,000 being released for the year. And by the end of fiscal year 2013 the Bureau expects a net growth of an additional 11,500 inmates. We believe the inmate population will continue to increase for the foreseeable future. But we will continue to take a variety of steps to mitigate the effects of crowding in our facilities.

While managing these challenges, we continue to exercise sound judgment in executing the budgets you provide. As good stewards of the public's trust we will continue to contain costs while maintaining a high level of service.

The President's fiscal year 2013 budget for the BOP is \$6.82 billion for the salaries and expenses account. The request includes program enhancements to begin the activation at USP Yazoo City, Mississippi and FCI Hazelton, West Virginia, and to acquire 1,000 additional contract beds. It also includes offsets, including \$41 million for a proposed legislative initiative which, if passed, would

allow additional good conduct time credit for inmates and \$11 million for realignment of regional and administrative operations.

For the buildings and facilities account, \$99.2 million is requested for base program needs, and a rescission of \$75 million in prior years' new construction unobligated balances is proposed.

The BOP's highest priorities have continued to be ensuring the safety of federal inmates, staff, and surrounding communities; increasing on board staffing at BOP correctional institutions; adding bed space to reduce inmate crowding to help prevent violence in our prisons; maintaining existing institutions in an adequate state of repair; maximizing the use of inmate reentry programs, such as education and drug treatment, in order to reduce recidivism; and seeking long term strategies to control population growth.

Crowding is of special concern at higher security facilities. These facilities confine a disproportionate number of inmates who are prone to violence. The BOP employs many management interventions in an attempt to prevent and suppress inmate violence. These interventions are resource intensive and include paying overtime to increase the number of custody staff available to perform security duties; utilizing staff from program areas which detracts from inmate programs and other vital institutional functions; locking down an institution after a serious incident and performing intensive interviews to identify perpetrators and causal factors; performing comprehensive searches to eliminate weapons and other dangerous contraband; and designating and housing inmates in special management units.

The mission of the Bureau of Prisons is challenging. While there are many facets to our operations, the foundation for it all is safe, secure, orderly institutions and each and every staff member in the Bureau is critical to this mission. Through the continuous, diligent efforts of our staff we collectively work 24 hours each day, 365 days per year, weekends and holidays, to protect the public. By maintaining high levels of security and ensuring inmates are actively participating in evidence based reentry programs we serve and protect society.

Chairman Wolf, this concludes my formal statement. As I have indicated in my testimony, the BOP faces many challenges as the inmate population continues to grow. For many years now the BOP has stretched resources, streamlined operations, and contained costs to operate as efficiently and effectively as possible. I want to thank you and the subcommittee for your continued support. I look forward to working with you and the committee on this request and will be happy to answer any questions.

[The information follows:]

STATEMENT OF CHARLES E. SAMUELS, JR.
DIRECTOR OF THE FEDERAL BUREAU OF PRISONS
BEFORE THE U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES

FEDERAL BUREAU OF PRISONS FY 2013 BUDGET REQUEST

MARCH 6, 2012

Good afternoon, Chairman Wolf, Ranking Member Fattah, and Members of the Subcommittee. It is a pleasure to appear before you today to discuss the President's Fiscal Year 2013 Budget request for the Federal Bureau of Prisons (BOP).

Although this is my first appearance before this Subcommittee as Director of the BOP, I have been with the Bureau for nearly 24 years, having started as a correctional officer and then holding many positions including Warden, Senior Deputy Assistant Director, and Assistant Director. Let me begin by thanking you, Chairman Wolf, Congressman Fattah, and other members of the Subcommittee for your strong support of the BOP. I look forward to continuing our work with you.

Our mission is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. As the Nation's largest corrections system, the Bureau is responsible for the incarceration of almost 217,000 inmates. Currently, the Bureau confines more than 176,000 inmates in 117 facilities that collectively were designed to house only 128,000 individuals. More than 18 percent of federal inmates are housed in privately operated prisons, residential reentry centers, and local jails.

Continuing increases in the inmate population pose ongoing challenges for our agency. In fiscal year 2011, the inmate population increased by 7,541 inmates, and by the end of fiscal year 2013 the Bureau expects a net increase of 11,500 inmates. System-wide, the Bureau is operating at 38 percent over rated capacity and crowding is of special concern at higher security facilities, with 53 percent crowding at high security facilities and 49 percent at medium security facilities. We believe the inmate population will continue to increase for the foreseeable future, but we continue to take a variety of steps to mitigate the effects of crowding in our facilities. The safety of our staff is always a top priority, and we use all available resources to ensure our institutions are secure.

While managing these challenges, we continue to exercise sound judgment in executing the budgets you provide. As good stewards of the public's trust, we will continue to contain costs, while maintaining a high level of service.

FY 2013 Budget Request

The President's FY 2013 Budget for the BOP is \$6.820 billion for the Salaries and Expenses (S&E) account. For the Buildings and Facilities (B&F) account, \$99.2 million is requested, and a rescission of \$75 million in prior years' new construction balances is proposed.

The BOP's highest priorities continue to be:

- Ensuring the safety of federal inmates, staff, and surrounding communities;
- Increasing on-board staffing at BOP correctional institutions;
- Adding bedspace to reducing inmate crowding to help prevent violence in prisons;
- Maintaining existing institutions in an adequate state of repair;
- Maximizing the use of inmate reentry programs such as education and drug treatment in order to reduce recidivism; and
- Seeking long-term strategies to control population growth.

S&E Program Changes

The request includes \$81.4 million in program enhancements to begin the activation process for two institutions, the United States Penitentiary (USP) at Yazoo City, Mississippi and the Federal Correctional Institution (FCI) at Hazelton, West Virginia, and to acquire 1,000 private contract beds.

Also included, are \$58.0 million in offsets: \$41 million for a proposed legislative initiative, which, if passed, would allow additional Good Conduct Time credit for inmates; \$3.2 million for expanding the compassionate release program; \$2.8 million for information technology savings; and \$11.0 million for realignment of regional and administrative operations. The inmate population is projected to continue to increase for the foreseeable future. As such, the BOP continues to require increased resources to provide for safe inmate incarceration and care, and the safety of BOP staff and surrounding communities, which is why the requested funding is vital.

The Administration has proposed legislation that would provide inmates with enhanced incentives for good behavior and for participation in programming that is proven to reduce the likelihood of recidivism. The first proposal increases good conduct time credit availability by seven days per year for each year of the sentence imposed. This would result in a reduction, within a year, of approximately 4,000 federal inmates in custody, resulting in a significant savings of taxpayer dollars. This proposal could result in a significant cost avoidance of up to \$41 million. This proposal would not only slow the rate of future crowding, it would also increase the incentives for inmates to comply with institution rules. Inmates who refuse to comply with institution rules could lose some or all of the available credits, thereby prolonging their time spent in custody.

The second proposal creates a new sentence reduction credit that inmates could earn for successful participation in recidivism-reducing programs, such as Federal Prison Industries,

education, and occupational/vocational training. Participation in these programs is voluntary to inmates so we are unable to estimate the specific amount of cost avoidance that this proposal might generate. We can, however, confidently assume this proposal would reduce the future anticipated growth in the inmate population while encouraging participation in programs proven effective at reducing recidivism, and thereby improve public safety.

B&F Budget Request

For FY 2013, a total of \$99.2 million is requested for the B&F appropriation. Additionally, a rescission of \$75 million in prior years' New Construction unobligated balances is proposed. The rescission eliminates \$64.7 million from the planned "Acquire Existing Institution for Higher Security FCI" project and reduces four partially funded projects planned for Leavenworth, KS; Letcher County, KY; Forrest City, AR; and El Reno, OK. The proposed rescission will leave \$500,000 or less in available funding for these projects.

With the continued and future projected inmate growth and age of existing prisons, the BOP continues to allocate Modernization and Repair (M&R) funds primarily for emergencies as major infrastructure and life safety systems begin to fail and to address a limited number of high priority major projects, annually. Approximately one-third of BOP's 117 institutions are 50 years or older. The aging and failing infrastructure at these locations exacerbates our challenges in maintaining our federal prisons.

The Federal Inmate Population

Continuing increases in the inmate population pose substantial ongoing challenges for our agency. In FY 2011, the inmate population increased by 7,541 net new inmates, and an additional 11,500 inmates are expected between now and the end of FY 2013. This growth is anticipated in large part because of the upward trend in drug offenders indicted, convicted, and sentenced to federal prison over the last few years. Drug offenders comprise the largest single offender group admitted to Federal prison and sentences for drug offenses are much longer than those for most other offense categories. We believe the inmate population will continue to grow for the foreseeable future, and so will the BOP's challenges to provide for safe inmate incarceration and care, and for the safety of BOP staff and surrounding communities.

The BOP is responsible for the incarceration of about 217,000 inmates. Approximately 81 percent of the inmate population is confined in Bureau-operated institutions, while almost 19 percent are under contract care, primarily in privately operated prisons. Most of the inmates in BOP facilities (51 percent) are serving sentences for drug trafficking offenses. The remainder of the population includes inmates convicted of weapons offenses (15 percent), immigration offenses (12 percent), violent offenses (7 percent), fraud and other property offenses (8 percent), and sex offenses (5 percent). The average sentence length for inmates in BOP custody is 9 ½ years. Approximately 26 percent of the federal inmate population is comprised of non-U.S. citizens.

It is particularly challenging to manage the federal prisoner population at higher security levels. The combined inmate population confined in medium and high security facilities

represents over 45 percent of the inmate population housed in BOP facilities. It is important to note that at the medium security level, about 66 percent of the inmates are drug offenders or weapon offenders, approximately 76 percent have a history of violence, 42 percent have been sanctioned for violating prison rules, and half of the inmates in this population have sentences in excess of 8 years. At the high security level, more than 70 percent of the inmates are drug offenders, weapons offenders, or robbers, another 10 percent have been convicted of murder, aggravated assault, or kidnapping, and half of the inmates in this population have sentences in excess of 12 years.

Moreover, approximately 70 percent of high security inmates have been sanctioned for violating prison rules, and more than 90 percent of high security inmates have a history of violence. One out of every six inmates at high security institutions or USP's is gang affiliated. There is a much higher incidence of serious assaults by inmates on staff at medium and high security institutions than at the lower security level facilities. Serious assaults are defined as assaulting any person, or an armed assault on the institution's secure perimeter (a charge for assaulting any person at this level is to be used only when serious physical injury has been attempted or accomplished). In FY 2011, 78 percent of serious assaults against staff occurred at medium and high security institutions. Highs made up 61 percent of serious assaults on staff, and 17 percent occurred at Mediums. Very few assaults occur at low and minimum security institution which house inmates who are less prone to violence.

Institution Crowding

The BOP confines over 176,000 inmates in Bureau-operated facilities, which have a total rated capacity of about 128,000 beds. Crowding is of special concern at higher security facilities including penitentiaries (operating at 53 percent over capacity) and medium-security institutions (operating at 49 percent over capacity). These facilities confine a disproportionate number of inmates who are prone to violence. The BOP has managed overcrowding by double and triple bunking inmates throughout the system, or housing them in space not originally designed for inmate housing, such as television rooms, open bays, program space, etc.

To manage crowding, we have taken a number of steps to help mitigate some of the effects in our facilities. For example, we have improved the architectural design of our newer facilities and have taken advantage of improved technologies in security measures such as perimeter security systems, surveillance cameras, and equipment to monitor communications. These technologies support BOP employees' ability to provide inmates the supervision they need in order to maintain security and safety in our institutions. We have also enhanced population management and inmate supervision strategies in areas such as classification and designation, intelligence gathering, gang management, use of preemptive lockdowns, and controlled movement. While we continue to look for ways to address crowding in our facilities, the challenges continue to increase as we face an ever growing inmate population.

In 2005, the BOP performed a rigorous analysis of the effects of crowding and staffing on inmate rates of violence. Data was used from all low-security, medium-security, and high-security BOP facilities for male inmates for the period July 1996 through December 2004. We accounted for a variety of factors known to influence the rate of violence and, in this way, were

able to isolate and review the impact that crowding and the inmate-to-staff ratio had on serious assaults. This study found that increases in both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) are related to increases in the rate of serious inmate assaults¹.

The analysis revealed that an increase of one inmate in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates. This demonstrates through sound empirical research that there is a direct relationship between crowding, staffing, and institution safety.

The BOP employs many management interventions in an attempt to prevent and suppress inmate violence. These interventions are resource-intensive and include: paying overtime to increase the number of custody staff available to perform security duties, utilizing staff from program areas (detracting from inmate programs and other vital institution functions), locking down an institution after a serious incident and performing intensive interviews to identify perpetrators and causal factors, performing comprehensive searches to eliminate weapons and other dangerous contraband, and designating and housing inmates in Special Management Units (SMU). SMU inmates consist of sentenced offenders who participated in or had a leadership role in geographical group/gang-related activity, or those who have a history of disruptive, disciplinary and/or misconduct infractions. The BOP designates inmates to SMUs because greater management of their interaction is necessary to ensure the safety, security, and orderly operation of BOP facilities, and protection of the public. SMU inmates require a more restrictive confinement than general population inmates. The BOP currently has 5 SMUs in operation.

Staffing

The mission of the Bureau of Prisons is challenging. While there are many facets to our operations, the foundation for it all is safe, secure, orderly institutions, and each and every staff member in the Bureau is critical to this mission. Through the continuous diligent efforts of our staff, who collectively work 24 hours each day, 365 days per year-- weekends and holidays—we protect the public. By maintaining high levels of security and ensuring inmates are actively participating in evidence-based reentry programs, we serve and protect society.

As of December 31, 2011, the BOP has 36,172 S&E staff on-board, which is 88 percent of the FY 2012 authorized level. The FY 2013 President's Budget Request proposes to increase staffing at existing institutions by 210 persons, and would bring the on-board staffing to 90 percent of the FY 2013 authorized level. The challenges have never been greater. The BOP is managing overcrowded institutions and taking on more gang-affiliated inmates, who are prone to violence.

¹ Federal Bureau of Prisons (2010). The Effects of Changing Crowding on Inmate Violence and Administrative Remedies Granted. Office of Research and Evaluation, Federal Bureau of Prisons, Washington, DC.

Inmate Reentry

We are committed to both parts of the BOP's mission – security and reentry. The Attorney General has made clear his strong commitment to reentry as a critical component of public safety. Maintaining high levels of security and ensuring inmates are actively participating in evidence based reentry programs are equally important to ensure the safety of our staff and to serve and protect society. It's our philosophy that "reentry begins on the day of incarceration," and we work with inmates to address identified skill deficiencies and weaknesses, provide appropriate treatment programs and assist with preparation for reintegration. Over the past few years we have made great strides in enhancing collaboration both within and outside our agency to ensure we are providing offenders the best opportunities for success once back in the community.

Our agency has no control over the number of inmates who come into Federal custody, the length of their sentences, or the skill deficits they bring with them. We do have control, however, over the programs in which inmates can participate while they are incarcerated; and we can thereby affect how inmates leave our custody and return to the community. Almost all federal inmates will be released back to the community at some point. Each year, over 45,000 federal inmates return to our communities, a number that will continue to increase as the inmate population grows. Most need job skills, vocational training, education, counseling, and other assistance such as drug abuse treatment, anger management, and parenting skills if they are to successfully reenter society.

Federal prisons offer a variety of inmate programs to address reentry needs, including work, education, vocational training, substance abuse treatment, observance of faith and religion, psychological services and counseling, release preparation, and other programs that impart essential life skills. We also provide other structured activities designed to teach inmates productive ways to use their time.

Rigorous research has demonstrated that inmates who participate in FPI or vocational training are 24 percent less likely to recidivate than similar non-participating inmates; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release². Also,

² Federal Bureau of Prisons (1985). PREP: Post Release Employment Project Interim Report, Office of Research and Evaluation, Federal Bureau of Prisons, Washington, DC.

Federal Bureau of Prisons (2000). TRIAD Drug Treatment Evaluation Project Final Report of Three-Year Outcomes: Part I, Office of Research and Evaluation, Federal Bureau of Prisons, Washington, DC.

Harer, M. D. (1995). Prison Education Program Participation and Recidivism: A Test of the Normalization Hypothesis, Office of Research and Evaluation, Federal Bureau of Prisons, Washington, DC.

Saylor, W. G. and Gaes, G. G. (1997). PREP: Training Inmates Through Industrial Work Participation and

inmates who participate in work programs and vocational training are less likely to engage in institutional misconduct, thereby enhancing the safety of staff and other inmates.

In 2001, the Washington State Institute for Public Policy evaluated the costs and benefits of a variety of correctional, skills-building programs. The study examined program costs; the benefit of reducing recidivism by lowering costs for arrest, conviction, incarceration, and supervision; and the benefit by avoiding crime victimization.

The study was based on validated evaluations of crime prevention programs, including the BOP's assessment of our industrial work and vocational training programs (the Post Release Employment Project study) and our evaluation of the Residential Drug Abuse Treatment program (the TRIAD study). The "benefit" is the dollar value of criminal justice system and victim costs avoided by reducing recidivism, and the "cost" is the funding required to operate the correctional program. The benefit-to-cost ratio of residential drug abuse treatment is as much as \$2.69 for each dollar invested in the program; for adult basic education, the benefit is as much as \$5.65; for correctional industries, the benefit is as much as \$6.23; and for vocational training, the benefit is as much as \$7.13. The study clearly indicates these inmate programs result in significant cost savings through reduced recidivism, and their expansion is important to public safety³.

Substance Abuse Treatment

The BOP is mandated by statute (the Violent Crime Control and Law Enforcement Act of 1994) to provide drug abuse treatment to inmates. Our substance abuse strategy includes a required drug education course, non-residential drug abuse treatment, residential drug abuse treatment, and community transition treatment.

Drug abuse education is available in all BOP facilities. Drug abuse education provides inmates with information on the relationship between drugs and crime and the impact of drug use on the individual, his or her family, and the community. Drug abuse education is designed to motivate appropriate offenders to participate in nonresidential or residential drug abuse treatment, as needed.

Non-residential drug abuse treatment is also available in every BOP institution. Specific offenders whom we target for non-residential treatment services include:

- inmates with a relatively minor or low-level substance abuse impairment;
- inmates with a more serious drug use disorder whose sentence does not allow sufficient time to complete the residential drug abuse treatment program;

Vocational and Apprenticeship Instruction. Corrections Management Quarterly, 1(2).

3 Aos, Steve, Phipps, P., Barnoski, R. and Lieb, R. (2001) The Comparative Costs and Benefits of Programs to Reduce Crime. Washington State Institute for Public Policy.

- inmates with longer sentences who are in need of and are awaiting placement in the residential drug abuse treatment program;
- inmates identified with a drug use history who did not participate in residential drug abuse treatment and are preparing for community transition; and
- inmates who completed the unit-based component of the residential drug abuse treatment program and are required to continue treatment until placement in a residential reentry center, where they will receive transitional drug abuse treatment.

Participants in the residential drug abuse treatment program live together in a unit reserved for drug abuse treatment in order to minimize any negative effects of interaction with the general inmate population. Residential drug abuse treatment is provided toward the end of the sentence in order to maximize its positive impact on soon-to-be-released inmates.

It is important to note that under our statutory mandate, the BOP is required to provide residential drug abuse treatment to all inmates who volunteer and are eligible for the program. In FY 2007 and FY 2008, the BOP could not meet this requirement due to inadequate funding for program expansion; however in FY 2009, FY 2010 and FY 2011, the BOP was able to provide residential drug abuse treatment to 100 percent of the federal inmate population eligible for treatment.

Because certain non-violent offenders who successfully complete all components of this recidivism-reducing program are eligible for an incentive of up to one year off their sentence, inmates are strongly motivated to participate. Due to limited capacity, however, inmates receive, on average, only an eight month reduction. The FY 2013 budget request of \$13 million would fund an expansion of the residential drug treatment program. An expansion of the drug treatment capacity will allow more inmates to participate in the program and earn an early release, thereby reducing crowding and costs. Specifically, such expansion will allow the BOP to treat all eligible inmates and extend the sentence reductions for those who qualify from the current 8 months average to the full 12 months allowed by statute.

Drug abuse treatment in the BOP includes a community transition treatment component to help ensure a seamless transition from the institution to the community, and inmates are monitored and managed across systems by BOP community corrections staff. As part of the community transition, the BOP provides a treatment summary to the residential reentry center where the inmate will reside, to the community-based treatment provider who will treat the inmate, and to the U.S. Probation Officer before the inmate's arrival at the residential reentry center. Participants in community transition drug abuse treatment typically continue treatment during their period of supervised release after they leave BOP custody.

Specific Pro-Social Values Programs

Based on the proven success of the residential substance abuse treatment program, we have implemented additional cognitive-behavioral programs to address the needs of other segments of the inmate population (including younger offenders and high-security inmates).

These programs focus on inmates' emotional and behavioral responses to difficult situations and emphasize life skills and the development of pro-social values, respect for self and others, responsibility for personal actions, and tolerance. Many of these programs have already been found to significantly reduce inmates' involvement in institution misconduct. The positive relationship between institution conduct and post-release success makes us hopeful about the ability of these programs to reduce recidivism.

Inmate Work Programs

Prison work programs teach inmates occupational skills and instill in offenders sound and lasting work habits and a work ethic. All sentenced inmates in federal correctional institutions are required to work (with the exception of those who for security, educational, or medical reasons are unable to do so). Most inmates are assigned to an institution job such as food service worker, orderly, painter, warehouse worker, or groundskeeper.

Additionally, approximately 13,500 inmates work in FPI. FPI is one of the BOP's most important correctional programs because it has been proven to substantially reduce recidivism. FPI provides inmates the opportunity to gain marketable work skills and a general work ethic -- both of which can lead to viable, sustained employment upon release. It also keeps inmates productively occupied; inmates who participate in FPI are substantially less likely to engage in misconduct.

At present, FPI reaches only 8 percent of the inmate population housed in BOP facilities; this is a significant decrease from previous years. For example, in 1987 FPI employed 32 percent of the inmate population. This decrease is primarily attributable to various provisions in Department of Defense authorization bills and appropriations bills that have weakened FPI's standing in the Federal procurement process. We are very thankful for the additional authorities provided in the FY 2012 appropriation, and are working to begin new programs.

Education, Vocational Training, and Occupational Training

The BOP offers a variety of programs for inmates to enhance their education and to acquire skills to help them obtain employment after release. Institutions offer literacy classes, English as a Second Language, adult continuing education, parenting classes, recreation activities, wellness education, and library services.

With few exceptions, inmates who do not have a high school diploma or a General Educational Development (GED) certificate must participate in the literacy program for a minimum of 240 hours or until they obtain the GED. The English as a Second Language program enables inmates with limited proficiency in English to improve their English language skills. Also, a number of institutions offer inmates the opportunity to enroll in and pay for more traditional college courses that could lead to a bachelor's degree.

We also facilitate vocational training and occupationally-oriented higher education programs. Occupational and vocational training programs are based on the needs of the specific institution's inmate population, general labor market conditions, and institution labor force

needs. On-the-job training is afforded to inmates through formal apprenticeship programs, institution job assignments, and work in the FPI program.

Life Connections

The Life Connections Program is a residential multi-faith-based program that provides the opportunity for inmates to deepen their spiritual life and assist in their ability to successfully reintegrate following release from prison.

Life Connections programs are currently operating at FCI Petersburg, USP Leavenworth, FCI Milan, USP Terre Haute, and the Federal Medical Center Carswell. BOP's Office of Research and Evaluation has completed several preliminary analyses of the program and found a reduction in serious institution misconduct among program participants.

Inmates who are not eligible for the residential Life Connections Program may volunteer to participate in a modified version of the program called Threshold. This is a non-residential spiritual/values based program taught by chaplains and volunteers over a six to nine month time period. This program is designed to strengthen inmate community re-entry and reduce recidivism. Currently 75 institutions are planning or offering Threshold in FY 2012.

The Second Chance Act

The Second Chance Act of 2007 required several changes to BOP policies and practices. The BOP is committed to providing opportunities for offenders to prepare for a successful reentry to the community. We have made significant progress toward meeting the mandates of the Second Chance Act, which is particularly noteworthy given the funding challenges we have faced in the past.

Inmate Skills Development Initiative

The Inmate Skills Development initiative refers to the BOP's targeted efforts to unify our inmate programs and services into a comprehensive reentry strategy. The three principles of the Inmate Skills Development initiative are: (1) inmate participation in programs must be linked to the development of relevant inmate reentry skills; (2) inmates should acquire or improve a skill identified through a comprehensive assessment, rather than simply completing a program; and (3) resources are allocated to target inmates with a high risk for reentry failure.

The initiative includes a comprehensive assessment of inmates' strengths and deficiencies in nine core areas. This critical information is updated throughout each inmate's incarceration and is provided to probation officers as inmates get close to their release from prison so as to assist in the community reentry plan. As part of this initiative, program managers have been collaborating and developing partnerships with a number of governmental and private sector agencies to assist with inmate reentry.

Specific Release Preparation Efforts

In addition to the wide array of inmate programs described above, the BOP provides a Release Preparation Program in which inmates become involved toward the end of their sentence. The program includes classes in resume writing, job seeking, and job retention skills. The program also includes presentations by officials from community-based organizations that help ex-inmates find employment and training opportunities after release from prison.

Release preparation includes a number of inmate transition services provided at our institutions, such as mock job fairs where inmates learn job interview techniques and community recruiters learn of the skills available among inmates. At mock job fairs, qualified inmates are afforded the opportunity to apply for jobs with companies that have job openings. Our facilities also help inmates prepare release portfolios, including a resume, education and training certificates, diplomas, education transcripts, and other significant documents needed for a successful job interview.

The BOP has established employment resource centers at most federal prisons to assist inmates with creating release folders to use in job searches; soliciting job leads from companies that have participated in mock job fairs; identifying other potential job openings; and identifying points of contact for information on employment references, job training, and educational programs.

We use residential reentry centers (RRCs) -- also known as community corrections centers or halfway houses -- to place inmates in the community prior to their release from custody in order to help them adjust to life in the community and find suitable post-release employment. These centers provide a structured, supervised environment and support in job placement, counseling, and other services. As part of this community-based programming, some inmates are also placed on home detention (statutorily limited to 10 percent of an inmate's sentence). They are at home under strict schedules with telephonic and electronic monitoring.

RRCs are most effective, in terms of recidivism reduction, for higher-risk inmates, especially those who have demonstrated a willingness to participate in education, vocational training, and treatment programs while they are in BOP institutions. Consistent with research findings, we continue to move the BOP toward a risk-reduction model in RRC programming, which recognizes that lower-risk inmates may need few RRC services and may, therefore, receive relatively short RRC placements and instead transition more rapidly to home detention; some may be placed directly in home detention with no time in an RRC. In contrast, higher-risk inmates who have shown they are ready to address their crime-producing behaviors may be appropriate for longer RRC stays. These changes will not decrease the number of inmates who will be placed in RRCs. Indeed, we anticipate they will result in greater numbers of placements in community-based programs and a more effective use of our limited RRC resources.

Conclusion

Chairman Wolf, this concludes my formal statement. Again, I thank you, Mr. Fattah, and Members of the Subcommittee for your continued support of our agency. As I have

indicated in my testimony, the BOP faces many challenges as the inmate population continues to grow. For many years now, the BOP has stretched resources, streamlined operations, and constrained costs to operate as efficiently and effectively as possible.

The FY 2013 President's Request will allow us to add bedspace for the constantly growing inmate population and expand drug abuse treatment programs. I look forward to working with you and the Committee on this request, and would be happy to answer any questions.

RADICALIZING MATERIALS

Mr. WOLF. Thank you, Mr. Samuels. In the fiscal year 2012 conference report the Committee instructed DOJ to eliminate the ability of Federal prisoners to access radicalizing materials, and the report on this topic is due March 7. Can you give us a preview of what BOP has done to prevent prisoners from having access to radicalizing materials? Have the radical materials that were previously identified been removed, and have you put in place procedures for ensuring that such materials cannot come into the prison collections?

Mr. SAMUELS. Yes, sir. Good question. What we have done in the Bureau of Prisons is put procedures in place for our religious services staff to review any material that is attempted to be introduced in the facility and any purchases we have made. And we have a national chaplain library review. And so all of the material is screened. Our staff are also——

Mr. WOLF. When was all that screened? Beginning when, what date did you begin screening all of that? Because I have seen material that has not been screened. So as of when——

Mr. SAMUELS. 2007.

Mr. WOLF. 2007?

Mr. SAMUELS. Yes, sir. The staff go through the screening process to review the material and they also work with our staff who work with identifying any issues of concern within the intelligence community. And if we determine that there is material that poses any threat to the safety and security of our facilities, we do not allow that material to be introduced. Because our goal is to detect and deter any type of form of radicalization, to prevent it.

Mr. WOLF. Well, will you be making the report available on the 7th? The report on the topic is due March 7th.

Mr. SAMUELS. The report?

Mr. WOLF. Yes.

Mr. SAMUELS. Well we——

Mr. WOLF. Will it be here on the 7th? We asked for a report, in the conference report——

Mr. SAMUELS. It has been forwarded to——

Mr. WOLF [continuing]. Report on the topic, it is here?

Mr. SAMUELS. It has been forwarded to DOJ.

Mr. WOLF. Okay. But I think it is supposed to be here on, what is today's date? The 6th. Will we get it tomorrow?

Mr. SAMUELS. We will follow up. I will follow up.

Mr. WOLF. Okay. How long have they had it, DOJ? How long has DOJ had it?

Mr. SAMUELS. Approximately two weeks.

Mr. WOLF. And how long is the report?

Mr. SAMUELS. It is not long.

Mr. WOLF. Three pages? Thirty-eight pages? One hundred and two pages?

Mr. SAMUELS. Approximately three. But I will follow up.

Mr. WOLF. Three? It cannot be very much of a report then, if it is three pages.

Mr. SAMUELS. We will follow up and submit it for the record.

[The information follows:]

RADICALIZATION MATERIALS

The final report on Radicalization in Federal Prisons, which was due March 17, 2012 to the Committees on Appropriations, is expected to be two to three pages in length. The report was transmitted to Congress on May 16, 2012.

FEDERAL PRISON INDUSTRIES

Mr. WOLF. Meaningful work opportunities. While BOP cannot control the number of inmates sentenced to prison it can impact how inmates occupy their time while incarcerated. Increasing work opportunities for Federal prisoners continues to be an important priority for the Committee. What is the status of BOP's efforts to increase the meaningful work opportunities available to inmates?

Mr. SAMUELS. The Bureau of Prisons recognizes, sir, the importance of, and is committed to, enhancing public safety, and reducing recidivism, through inmate work programs. Inmate work opportunities, as you know, are a key component to the agency's release preparation efforts. As you are aware, Federal Prison Industries, one of our most important correctional programs, has been proven to substantially reduce recidivism. We are working towards having many of the jobs within Federal Prison Industries converted to part-time jobs so we can increase the number of participants within our institutions. We are also ensuring that the inmates who are involved in work programs, have time to participate in programs during the day as well as allowing them to work in jobs in the evening to ensure that we are maximizing the number of inmates who are employed within the Bureau.

Mr. WOLF. How many people work now in UNICOR?

Mr. SAMUELS. 14,000 are currently employed.

Mr. WOLF. And at their high point, what was it?

Mr. SAMUELS. At the high point it would average about 24,000. We have lost within the last few years 10,000 jobs in UNICOR.

Mr. WOLF. And what are the statistics showing that if a person participates they are less likely to go out and commit a crime when they leave?

Mr. SAMUELS. Individuals who participate by working in UNICOR, the statistics show that they are 24 percent less likely to recidivate when compared to those who are not working in Federal Prison Industries.

Mr. WOLF. You know I have been disappointed in the Bureau of Prisons. I was out in a national park and I bought a hat. And when I looked in the hat, the hat was made in China. And I am finding that most of the Federal caps are made in China. Most of the university caps are, too. We provided language, both sides supported it, to give you the ability to have more people working and doing it in such a way that creates jobs for Americans—to partner up with American companies. I saw that Fox News piece with regard to the jacket, which I think was very unfortunate. The purpose of our language was to create more jobs in America for American workers outside of prison and for American workers inside of prison. Where are the BOP hats made? Your Bureau of Prison hats, where are they made?

Mr. SAMUELS. We engrave, or the monogramming on the hats is done by the Bureau of Prisons. And we purchase—

Mr. WOLF. The hat itself is made where? Where are the the Bureau of Prisons hats made?

Mr. SAMUELS. I would say the hat more than likely is made in China, sir.

Mr. WOLF. You know, this is crazy.

Mr. FATTAH. We can do something about it, Chairman.

Mr. WOLF. Well, we are trying. We have given language. Also, I went to a federal installation, you have been there too, and they gave me this coin. And I am going to hold it up and put it away so nobody can see it, because I am not blaming them, but it was made in China. Do you give coins out? Do you have coins that you give? Is there a Bureau of Prisons coin? There is or there is not?

Mr. SAMUELS. Yes. Yes, sir.

Mr. WOLF. And where are they made?

Mr. SAMUELS. I would have to find out, sir.

Mr. WOLF. Well could somebody call down while the hearing is going on? Just call the office and say can we get a coin out? Are they made in China or are they made in—can somebody call down?

The Committee has been trying to help. I believe very deeply that you cannot put a man or a woman in prison for ten or fifteen years and give them no dignity. The whole thing of what the Committee was trying to do was to repatriate jobs. We did not want you to compete with any American manufacturers. We did not want you to take any job away from an American worker. We actually wanted you to create jobs for an American worker, because if you were making hats then whoever drives the truck up to drop the fabric by, or drop the machine that does the stitching by, is an American, an American worker. And also to combine in cooperation with an American hat manufacturer, and there is only one or two left in the country, that would create jobs in the private sector but also create jobs in the Bureau of Prisons to give men work and dignity. And I bet if you go back and look at this record, Mr. Serrano was there I think, we have been talking about this and nothing ever happens. Where were they made?

Mr. KANE. I am checking right now, sir.

Mr. WOLF. Oh, okay.

Mr. SAMUELS. Mr. Chairman, we appreciate the new authorities.

Mr. WOLF. Yeah, I—

Mr. SAMUELS. And I can assure you since my appointment that this is one of the highest priorities that I have as the director for the Bureau. And I believe that if we continue to be aggressive in this area that we can benefit by utilizing the new authorities to create more jobs within Federal Prison Industries. And to echo, sir, as you stated, to bring back, repatriate these products back to the United States and in effect help create jobs within this country.

Mr. WOLF. Well but you, and it is not your fault so you are off the hook to a certain degree. How long have you been in the job?

Mr. SAMUELS. I was appointed December 21, 2011.

Mr. WOLF. It is partially your responsibility, but the language has been there for quite a while. And I think you are just missing an opportunity. I mean—

Mr. SAMUELS. And sir, I take full responsibility for—

Mr. WOLF. Well no, it is not your full responsibility.

Mr. SAMUELS [continuing]. The agency.

Mr. WOLF. The Attorney General was here the other day. He seemed very interested, very sympathetic to what the Committee is trying to do. Again, I want to preface this. We are not taking a job, we do not want the Bureau of Prisons to take a job from an American worker. We want the Bureau of Prisons to create positions whereby we can have more American workers and repatriate the jobs back from China, or wherever the case may be, and do them here. Now we had asked, and let me ask you publicly, would you ask the Justice Department to convene a meeting of all of the agencies and ask them where they are making their products. Their hats, their coins. And then try to get a cooperative arrangement with several American companies so that you can legitimately, honestly, ethically, decently say that you are honestly trying to create jobs in the private sector as well. And then ask NASA, every agency, would they work with you and with this private company, or with a consortium of companies. Maybe work with the American Apparel Association, to bring this industry back into the United States. I mean, would you, within the next 30 days, convene every Federal agency there is in the government and ask them. How many hats do you think you have in your house? I have five kids. I have so many baseball caps.

Mr. SAMUELS. Mr. Chairman, probably 15.

Mr. WOLF. And every college. Do you know where all the college hats are made? They are made in China.

Mr. SAMUELS. Yes, sir.

Mr. WOLF. And so if we could have those hats be made in the Shenandoah Valley, or Pennsylvania, or New York City, and then work a cooperative arrangement and do it in a way that is very open. Not secretive. I think you should make it very clear. You all were on the defensive on that show. It was wrong, and I do not want to get into the details, to be taking a job from an American company. But I think what you could do is to create more jobs for those American companies by asking them to repatriate, to bring jobs back.

I mean, I would be prepared to write every college in the Commonwealth of Virginia. I spoke to the President of one college and they were open, a very large college, a very big college, a very well known college, they were open to using the Bureau of Prisons. And if we did it in such a way that we were not just making this through UNICOR but we were also making it with a private company kind of coming alongside. And then when that worker got out of prison, there would be an industry that he could be involved with. Do you have an answer regarding the coins?

Mr. SAMUELS. Yes, sir. The Director's coins are made in the U.S.A.

Mr. WOLF. U.S.A.? Well then can you tell us who makes them and we are going to write all these other agencies and tell them they ought to be switching rather than having the slave labor in China make their coin. They ought to be making the coin, whoever the company is, so we can create more jobs. So I think you get a gold star for having yours made in the U.S. The hats, you have not gotten an answer back yet. I am kind of hoping your hats are made in the U.S. Is somebody checking on the hats?

Mr. KANE. I will ask right now, sir.

Mr. WOLF. Yeah, if we could just check. Mr. Fattah.

MR. SAMUELS' BACKGROUND

Mr. FATTAH. Thank you, Mr. Chairman. Let me welcome you and congratulate you on your appointment. And you have been on the job for three months now? Is that—

Mr. SAMUELS. Yes, sir.

Mr. FATTAH. Okay. But you have been at this for some 24 years, and you started out as a correctional officer?

Mr. SAMUELS. Correct.

Mr. FATTAH. And just for the record, you are from Birmingham, Alabama and you have risen up through the ranks. And I understand you also went through the Senior Executive Program at Harvard?

Mr. SAMUELS. Yes.

Mr. FATTAH. At the Kennedy School?

Mr. SAMUELS. Yes, sir.

Mr. FATTAH. I went through that program. It is a great program.

Mr. SAMUELS. I agree.

OVERCROWDING

Mr. FATTAH. So I want to welcome you to the committee. And obviously the chairman and I have an interest in trying to help you as you think through these responsibilities. Obviously you have an overcapacity issue of something approaching 40 percent. I think 39 percent, 38 percent overcapacity. And I note in the budget submission you do not have any new construction requests. Is that correct?

Mr. SAMUELS. Correct.

DRUG TREATMENT

Mr. FATTAH. Right. So this challenge is going to have to be handled in other ways. And part is through a legislative initiative around earned time, or good time. We are very interested, and the committee has been supportive of some state efforts using evidence-based approaches to reduce prison populations but not increase challenges related to public safety. I mean, what we want to do is have a process in which they can leave places where you look out for them and not have to reenter. And there are a number of ways, such as through drug treatment programs, which are cost effective. I think they actually save money over the long term. This is empirical information. And some 51 percent of your inmates are in on drug charges?

Mr. SAMUELS. Yes, sir.

Mr. FATTAH. So what availability of drug treatment programs exists relative to those who might need to take advantage of them?

Mr. SAMUELS. Okay. Currently, with our drug programs we have drug education offered at all Bureau institutions. For the President's fiscal year 2013 request we are asking for an additional \$13 million and 120 additional positions so we can ensure that all inmates have an opportunity to participate who are eligible. And we also believe that that will help us give inmates an opportunity to maximize the length of time that they can get off their sentence.

Right now we are averaging about nine months for inmates who complete that program.

Mr. FATTAH. And it is about \$2.60 savings for each dollar invested?

Mr. SAMUELS. Yes, sir.

Mr. FATTAH. Now Governor Christie of New Jersey has just ordered in his state that drug treatment be made available to all inmates. And I think that the National Institute of Justice in many of their data show that this is a very significant effort that if undertaken could maybe move the country out of the unfortunate position where we now imprison more people than any other country in the world, which is a very unfortunate circumstance.

NON-U.S. CITIZEN INMATES

Now 25 percent, 26 percent of your inmates are non-U.S. citizens?

Mr. SAMUELS. Correct.

Mr. FATTAH. And are there trade offs between having them serve their time in their own country versus here? Or is that just something that under our set of circumstances is not an allowable choice?

Mr. SAMUELS. We have a treaty transfer program within the Federal government, and our goal is to identify and work with inmates who are willing and interested, and if the countries will take them back. Our efforts are to increase the utilization of that. So if inmates meet the criteria we would like to pursue having them return to their countries to serve their time, for inmates that fall within that category. We have about 94 agreements with various countries.

Mr. FATTAH. And is this an area where additional legislative or other resources could be helpful to you? Or is this something that pretty much tracks based on these treaties, and it is working as well as it can work?

Mr. SAMUELS. It is working as well as it can. However, again, it is an education process that our staff have to be diligently involved with explaining the procedures and how the inmates can apply for consideration. And ultimately the country who would be willing to take the individuals back.

Mr. FATTAH. Because I assume that even if we paid for it it would be cheaper for them to be imprisoned in their own country than to be in prison here?

Mr. SAMUELS. Yes, sir.

INMATE PROGRAMS

Mr. FATTAH. Okay. Now you know, the interest in work and work training is connected to this issue of generally how they got there in the first instance, right? Because there is a correlation between educational attainment and incarceration. To what level are GED and other educational opportunities available in the federal prison system?

Mr. SAMUELS. All inmates, when they are placed in the Bureau of Prisons are screened to determine their skill sets and/or deficits. And if there is a need for educational participation, our staff works with the inmates, and we encourage the inmates to obtain a GED

if they do not have a GED. There is a requirement that they spend a certain amount of time in the process of obtaining a GED. If there are reasons, due to their mental capacity, where they cannot obtain it, then there are recommendations for, or waivers considered for that. But we require all inmates to participate in educational programs.

Mr. FATTAH. So on average they stay with you for about nine years, which is a considerable amount of time. Right? And the question is at the end of the nine years have we moved them down some continuum which might be helpful about what their result might be for the rest of their lives? Not only do we not want them to have to be at one of your facilities again, we do not want them to have to victimize other people in order to get a ticket back to one of your institutions. There seems to be some synergy across party lines and across philosophical lines. Very conservative people, very liberal people are very interested now in how we can do more to lock up fewer people and for less time and make our communities safer at the same time. The empirical evidence funded through this committee shows that in many instances this can be done.

Now there are people who have to be locked up for very long times and cannot function safely in society. But what percentage of the people that you have are going to be released at some point?

Mr. SAMUELS. The percentage of inmates incarcerated?

Mr. FATTAH. That will eventually be released.

Mr. SAMUELS. I think the percentage is somewhere around 94 percent, of all inmates incarcerated.

Mr. FATTAH. Right. So society should have some interest in trying to make sure that upon their release they are slightly less or hopefully even better than slightly less likely to recidivate than when they originally got introduced to the federal system.

So we want to work with you. We understand that you have got tremendous challenges. Last year I think the chairman did extraordinary work in making sure that your budget was fully funded. Obviously this is an area in which there is no doubt about federal responsibility. These are federal inmates. But it is \$6.8 billion. And at the end of the day there are a lot of lives involved. And we would have to figure out how to do it just a little bit differently than we have been doing it.

I think the chairman is passionate on this. It may seem simple about the hats. But it is not just the hats. The fact is that on lower end goods that are needed but are not going to be manufactured in America—even though we are the leading manufacturer in the world and we do very well on high end products such as jet engines, and all kinds of other things—if there are items that do not create competition for the private sector but can give people some work to do, and hopefully some training, and beyond that, some opportunity to prepare themselves for eventual life outside the prison walls, then we want to find opportunities to help you do that. That is really the point. And as appropriators the way we help, usually, is we provide resources, or we provide language that allows you to access what it is that you need to access to do this.

As a correctional officer, you know that it makes life safer for correctional officers if inmates have something to do.

Mr. SAMUELS. Yes.

Mr. FATTAH. And if they feel as though they can even reduce the time that they might have to be in your care, by either earning educational credits, or drug treatment, or working, and at the same time, not just federal agencies but also little league teams and everybody can have baseball caps, t-shirts, that otherwise are going to made somewhere else anyway, then we need to find a way to do that. And, you know, the lynchpin for working up here on the Hill with the Appropriations Committee is that when members have an interest we want to work with people who have an interest in following through on those things. So we look forward to working with you. Thank you, Mr. Chairman.

Mr. WOLF. Mr. Serrano.

FEDERAL PRISON INDUSTRIES

Mr. SERRANO. Thank you, Mr. Chairman. Welcome and congratulations on your appointment. You know, I want to join the Ranking Member Fattah and Chairman Wolf on the issue of what can be done to have some of those products made in this country, those items. And also without stepping on anybody's toes. Recognize there are many of us who feel that that is a proper thing to do. And the chairman has been a strong advocate for this. I mean, he has been on this subject for a long time.

You know, it reminded me, Mr. Chairman, if I take a moment here, of 15, 20 years ago. There was a discussion about a constitutional amendment on flag desecration, flag burning. And I was one of those who were saying, look I have no love for anybody who burns my flag. But a constitutional amendment to say you cannot do it, that is a whole different issue. And so on and so forth.

During that debate what I found out that was most stunning to me at that point was that most of the little flags being waved on the House floor by those who were supporting the amendment were not made in this country. And that in itself seemed dramatic to me. That the argument maybe should have been a constitutional amendment, I am kidding, to say they must be made in this country, you know, rather than some person deciding they could burn the flag.

But this is a serious issue. The chairman takes it seriously. Mr. Fattah supports him. And I join in saying within what we are allowed to do, it is not a bad thing if some of these items begin to be made right here.

CENSUS COUNTING OF PRISONERS

Director Samuels, I have discussed in the past the fundamental unfairness of the Census Bureau counting prisoners at their place of incarceration for reapportionment purposes, which is a subject that is very hot in this country right now, rather than at their home of record where they are likely to return after their sentence is finished. Several states have now mandated that for redistricting purposes prisoners be counted at their residences prior to incarceration rather than at their place of incarceration. And that usually goes to a state prison. In upstate New York, for instance, and the folks get counted there for creating new congressional districts rather than in New York City, or in Buffalo, or where they belong.

When the Bureau of Prisons has a federal prison in a state with this policy, does the Bureau work with these states to help identify a prisoner's home address from prior to incarceration? And the follow up to that would be how do you, under current policy, keep records of the original address, or the initial address, and what kind of records do you keep on that? But do you work, when you have a federal prison in one place that has that law in place, how do you work with them? Or do you work with them?

Mr. SAMUELS. Congressman Serrano, I would have to follow up on the first question to find out in fact if this is something that we are working with the state departments of corrections to track. And for your second question, we would have any information pertaining to those individuals—

Mr. SERRANO. Right.

Mr. SAMUELS [continuing]. For their residence of record.

Mr. SERRANO. Right. I usually do not do this, but do you think there would be someone on staff now that would know if for instance when New York's new law that says you must use your original address, or the initial address, or the address where they live, if the Bureau is working with them on that?

Mr. KANE. I do not know. I will find out.

Mr. SERRANO. Okay. Please do because that has been a very big issue and it is coming to a head by these laws that are being passed.

[The information follows:]

CENSUS BUREAU COUNTING OF INMATES

The relevant laws regarding census in New York are: N.Y. Correct. Law §72 (McKinney) and N.Y. Legis. Law §83-m (McKinney), first passed in 2010, but the current versions became effective March 31, 2011. However, the law specifically excludes federal prisoners by stating that "all persons confined in a federal correctional facility on census day, the task force shall consider those persons to have been counted at an address unknown and persons at such unknown address shall not be included in such data set created pursuant to this paragraph."

HISPANIC INMATES

According to the most recent data, 30.47 percent of federal prisoners are now Hispanic. What impact has this had on the federal prison system? What challenges are raised when so many of these prisoners are imprisoned because of immigration violations? And so there are language issues. So many are for immigration violations. I understand also that the majority, seven of every ten Latinos sentenced in federal courts in 2007 did not have U.S. citizenship. So how do all these things come into play? And how does this stress your system, or not? You know?

Mr. SAMUELS. The challenges we face, Congressman, as you stated, the language barrier with some of our institutions being located in remote areas. And a significant number of the inmates, depending on their security level, and if they are criminal aliens looking at deportation, we have placed a significant number of those individuals in our private facilities. And we work towards ensuring that programming opportunities that we would need to provide, I mean, that is something we have to weigh in on as well. Because we believe that for any inmate placed in our system, we should be working towards providing them reentry opportunities as well.

So we, again, look at the number of staff. And if there are issues with language, we have to ensure that we are staffing appropriately to deal with those concerns within the population.

Mr. SERRANO. And does it become, obviously then you need instructors and other folks who speak languages other than English. Have we done better in that throughout the years? I mean, this is a question I have asked in the past. And at times it seemed like we were not making real progress on that.

Mr. SAMUELS. It is something we are continuing to work towards. You know, to improve our efforts with it. We do try to make available the programs that individuals can use through education type courses, to assist with them. But it is a challenge. I have to tell you, within our facilities, spread throughout the United States and ensuring that recruitment efforts and getting the staff that can actually come in and provide these services. And at the same time, we work through our contracting efforts to ensure that we can bring in contractors to provide the services where we cannot.

Mr. SERRANO. Right. All right. Well, any further information you could give the committee on that, I am sorry, you could give us on that. The chairman will tell you when he wants something for the committee. I will be, I think we would all be pleased with that.

MARIEL CUBANS

Mr. Chairman, I have one further last question. And it is something to do with my curiosity. When I first came to Congress in 1990 one of the big issues, if you recall, was the Mariel boatlift. And that was 125,000 folks that came over from Cuba. And I do not remember exactly why but many of them were in federal prisons after that. I do not know if it is because we found out that they had been in fact let out of a Cuban prison? It was during the height of that Cold War with Cuba, where we and Radio Martí, which was funded by this committee, were being accused of telling people from Cuba to leave, leave, leave. And so the Cuban government says, oh yeah? Well, go. And not everybody who was going to leave left. Some other folks left, supposedly. So those people were in federal prison. And I could never really figure out why they were in federal prison, or why they were in prison at all. My question would be, and I do not know who is old enough in the crowd to remember that, in the staff, are these folks all back in Cuba? Are they still in federal prison? Are they part of the regular population of this country? What happened to all those folks from the Mariel boatlift that were in prison?

Mr. SAMUELS. Many of the individuals through the immigration process have been vetted and an outcome provided. However, we do have some individuals within our system who still fall within that category.

Mr. SERRANO. Vetted how? I am sorry. They were found not to have been——

Mr. SAMUELS. Well when I say vetted, I mean to go through the immigration process to determine their status.

Mr. SERRANO. So the reason they were in prison was because they were undocumented if they will? Because Cubans have the Adjustment Act. All they have to do is touch ground and they can

stay. So I am not, I mean, maybe if you could just for my curiosity get back to the committee and tell us what happened there.

Mr. SAMUELS. Okay.

Mr. SERRANO. As I sink in this chair. Look at this. This happens all the time. Yeah.

[The information follows:]

MARIEL CUBANS—CURRENT NUMBER AND REASON THEY ARE IN CUSTODY

The Mariel Cuban Boatlift officially began April 15, 1980 and ended October 31, 1980, with the arrival of over 125,000 Cubans to Southern Florida from the port of Mariel, Cuba. More than 23,000 of the arriving Mariel Cubans revealed previous criminal convictions to Immigration and Naturalization Service (INS) officials. Many of those convictions were for offenses that would not ordinarily warrant detention. The majority of Mariel Cubans were granted parole and released shortly after their arrival in the United States.

In 1980, the Attorney General directed the Bureau of Prisons (BOP) to provide detention space for criminal and mentally ill Mariel Cubans who could not be safely detained in INS temporary detention centers or at any of the resettlement camps established to process the Mariel Cubans. As a result, the BOP was responsible for a significant number of Mariel Cubans who committed crimes while in the United States and who had returned to INS custody after serving sentences in federal, state and local correctional facilities.

As of March 20, 2012, only two Mariel Cuban inmates remain in BOP custody. Immigration and Customs Enforcement (ICE) is responsible for determining when they would be released. The BOP has no authority in this matter.

Mr. SAMUELS. We will submit.

Mr. SERRANO. Okay, please. Because Mr. Chairman, I—

Mr. WOLF. No, I—

Mr. SERRANO. Do you remember that subject? We totally, everybody forgot about it.

Mr. WOLF. I do.

Mr. SERRANO. And I am not saying that is a negative, you know, but—

Mr. WOLF. They were involved in a major riot down in Orlando.

Mr. SERRANO. Yes. Yes.

Mr. WOLF. And so are there some of them still in prison?

Mr. SAMUELS. Yes, sir.

Mr. WOLF. In Federal prison?

Mr. SERRANO. And for crimes committed in this country? Or because we suspect they came out of prison in Cuba?

Mr. SAMUELS. For various reasons, I think. I mean, what their status is—

Mr. SERRANO. But it cannot be the status. Cubans do not have an immigration issue.

Mr. SAMUELS. When I say status, I mean determining how the judicial system or the country is looking at their status for where they stand being confined within the prison system.

Mr. WOLF. But I think what, I think Mr. Serrano, and I do not—

Mr. SERRANO. Right.

Mr. WOLF [continuing]. That are they in there because they came here and they committed a crime? They robbed a 7-11? Or were they criminals in Cuba and they came here, and now they are here because Cuba will not take them back and they are in limbo? That, that—

Mr. SERRANO. Yeah. Because part of that Cold War rhetoric, if you remember, was that we claimed, or some of us claimed, not me,

that everybody in a Cuban prison was a political prisoner. And so we found out that that was not true. That every country has folks who broke the law. And I, it always——

Mr. SAMUELS. We will sort of look at the individuals within that——

Mr. SERRANO. Yeah, I would like to know. It is sort of an unclosed chapter for this committee and for your Bureau. So I would like to know what happened to these folks.

Mr. SAMUELS. I can certainly give you their legal status and how many.

Mr. SERRANO. Yes.

Mr. SAMUELS. Yes, sir.

Mr. SERRANO. Thank you.

FEDERAL PRISON INDUSTRIES

Mr. WOLF. We are not going to keep hitting the UNICOR thing. I just wanted to wrap it up because I was not sure if you said yes or no. Will you help convene a meeting, or convene a meeting, and bring all the agencies together to ask them to use UNICOR in co-operation with the private sector, and do kind of a public/private partnership so we can kind of jump start this and have more jobs in Federal prisons working to create more jobs outside.

Mr. SAMUELS. Yes, sir. This is one of the goals that we want to pursue and we will make every effort——

Mr. WOLF [continuing]. All the Federal agencies together? That is what, I want the department, and I think the Attorney General was supportive, to bring all of the Federal agencies together that use different items to see how we can get UNICOR working again. I want to stress: I do not want UNICOR to take a job away from a company in Alabama, where you are from, or Pennsylvania, or Virginia, where I am from. I want them to work with the American Apparel Association to develop a cooperative arrangement. But would you not agree to bring all of the Federal agencies together to talk about this?

Mr. SAMUELS. Yes, sir. We will make the effort to bring as many people together as we can to showcase what UNICOR has as far as products and what we are able to do. And we also want to take advantage, as you have given us the ability to in the new authorities, and work within that to partner with businesses. Because as Congressman Fattah stated, the ability to have inmates working in the prisons is very, very important for a number of reasons. I mean, it really helps with recidivism. It makes our institutions safe. We do not want inmates in large numbers sitting around in the institutions with nothing to do. I think the benefit that it gives to the taxpayers overall is that it does help reduce the deficit if we can get these individuals out and they do not come back. And the basic skills that we are giving them, you know, through working. So this is something that I can assure you as the Director that I believe is very, very important. It is one of the highest agendas that I have in working with the department as you have stated, you know, with the Attorney General to see what we can do to explore every opportunity that we can.

We realize that with the new authorities it will require some start up costs and planning for that. However, for the 14,000 that

we currently have working I can assure you, Mr. Chairman, that our goals, and my goal as the Director, is not to take jobs away from American citizens. I mean, we want to find the niche that is out there, where we can capitalize on it, and really work with the businesses so they can in turn show that, by working with the Federal system and partnering, that we are helping them have skilled workers. When they leave the Federal system, they can go out and can obtain jobs. That is our overall goal.

And I want to thank you and the entire committee for the support that you all have given. Because this is something that is crucial for our prison system. With the number of inmates that we have, we have to have job opportunities and things for them to do within the prison.

Mr. WOLF. And there is less likelihood that when they are released at the end of their time they will commit a crime. True or false?

Mr. SAMUELS. True. And more likely, sir, that they will be gainfully employed for an extended period of time. So it's very important.

DRUG TREATMENT

Mr. WOLF. On their reentry, almost all Federal inmates will be released back into the community at some point, 94 percent as you were telling Mr. Fattah. Most need job training, work experience, education, counseling, and other assistance such as anger management, drug abuse treatment, other behavioral if they are to successfully reenter. What types of programs designed to reduce recidivism does BOP offer? And how many prisoners—when Mr. Fattah asked I was curious—how many prisoners are in the Federal Bureau of Prisons who want to participate in a drug rehab program and cannot get in?

Mr. SAMUELS. Right now we are able to provide participation for all inmates.

Mr. WOLF. So no one in Federal prison who wants to get into a rehab program is denied?

Mr. SAMUELS. No, sir. The issue we are dealing with is that we want them to get the maximum amount of time with the year off. So by being able to increase our staff we can assure that we are running the program so there is no delay, so they can start at an appropriate time, with time remaining on their sentence so they can capitalize on getting—

Mr. WOLF. And how long is the program?

Mr. SAMUELS. The program starts at about 18 months out. And so when they are living within the residential community we are ensuring that we can get them in. And it is a community where they actually have to live together within the housing unit, so we do not have others who would go in and do things to disrupt the integrity of the program. So it is having the ability to get them in so they can start in time to maximize the number of months that they can get off their sentence. And that is our goal, because it helps us as well as helping them when they get out.

Mr. WOLF. Are they good programs? I was in a prison where they had a drug rehab program, it was down at Lorton, and boy was it a nightmare. They were just showing a movie. And is this one ac-

credited? I mean, you believe this is a very good program and has a high success rate?

Mr. SAMUELS. Yes, sir. I believe the program is very good for a number of reasons. I have served in different capacities, as stated for the record, in my career. As a warden who had the program in the facility, there is a change, I mean, with the inmates. You can see individuals that actually go in, and I think many who start out just for the main reason of the opportunity to get time off their sentence. You know, that is typically the carrot to get them in. But when they actually get into the program, the change that you see in the individual is very positive. Not only that, there is the likelihood that they are not going to be involved in disruptive behavior. It really changes individuals, and I think for the good. With these types of programs that we have, it is so important to get the inmates in to participate. I think the other incentive that we can utilize is the opportunity with the proposal for the programs, where individuals are participating, but right now they cannot receive any significant time off of their sentence. Because if we can get these individuals in for these evidence based reduction programs in larger numbers, it will benefit the inmates as well as society, and it helps us with our crowding. Because we do not under any circumstances want individuals after they are released coming back to the prison. This is something that I have stressed to the staff. And I know prior directors have done it as well.

RECIDIVISM REDUCTION AND PROGRAMS

Since my appointment one thing I have done, sir, is that I have personally written to every inmate in the Bureau of Prisons and expressed my desire to work with them and give them opportunities. Because we want to see them succeed. I sent it out, and in Spanish, to ensure that I was capturing the most inmates. Because I want them to know that this is very important. And we do not want this revolving cycle of them coming into the system after they are released. I have explained to every staff member who works for the Bureau of Prisons that is our law enforcement as well as non-law enforcement staff, that we have an obligation and a duty to do what we can. Not just safely and securely housing inmates within the federal system, but our primary mission is to reduce recidivism and ensure that when individuals are released that there is no further victimization against American citizens.

Mr. WOLF. What is the recidivism rate now in Federal prisons? And what is the recidivism rate in probably the best run state prison?

Mr. SAMUELS. I think our, it would be comparable to—

Mr. WOLF. What is your percentage now? Of those who are in prison, how many will come back?

Mr. SAMUELS. It is about 40 percent.

Mr. WOLF. And what was it in the year 2000? In the year 1990? In the year 1980? And the year 1970? Are we making progress or—

Mr. SAMUELS. It has been stable.

Mr. WOLF. Stable?

Mr. SAMUELS. Yes.

Mr. WOLF. But no better, no worse?

Mr. SAMUELS. Correct.

Mr. KANE. It actually improved from '90 to 2000 from 44 percent down to 40 percent. So about a relative decrease of 10 percent.

Mr. WOLF. What was the reason for that? What do you attribute that—

Mr. KANE. Increasing the focus on programs.

Mr. WOLF. Like work?

Mr. KANE. Like work. Like on residential drug abuse treatment and—

Mr. SAMUELS. Education, Federal Prison Industries.

Mr. WOLF. Yeah. I walked through one of your prisons a couple of years ago and a lot of guys were kind of hanging around. And I think everybody there should be pushed to work. Also there was something else, too. By paying them a salary there is the opportunity for restitution. There is also the opportunity to send money home to their loved ones to buy their children a gift, to have some resources that belong to them. And lastly, there is the opportunity for when they leave prison to leave with a sum of money. Not a lot of money, but some money that is theirs. When a guy gets out of prison, you let him go, what do you give him? Fifty bucks and a set of clothes? I talked to a prisoner the other day, I was mentioning. What do you actually give them? If I am being let out of prison today, what do I get if you let me out? What do I, what am I given? A set of clothes?

Mr. SAMUELS. Well Mr. Chairman, we give them clothing. And we also, if they have not saved any money while they have been incarcerated, we would give them a gratuity. But I can tell you, one thing that we really stress to the inmates throughout their incarceration is saving. And my staff meet with the inmates routinely. We look at their account to determine how much money they are actually spending within the institution.

Mr. WOLF. It is hard to save if you are not working. I mean, there is not any other way to make money, is there?

Mr. SAMUELS. Right. And we expect for the inmates, every inmate in the Bureau of Prisons, we expect for them to work. There should only be a few occasions where they are not working, relative to security concerns or medical.

Mr. WOLF. Is it just like sitting around picking up butts.

Mr. SAMUELS. Mr. Chairman, I would add that even if the job appears to be something that is not significant but the basic skills—

Mr. WOLF. They should be so busy, and then treated with an opportunity and dignity. What if you are let out of prison in Harrisonburg now, and you live in Boston. How do you get home?

Mr. SAMUELS. If the individual needs transportation for that, if the family, and this depends on—and you are saying, so I am correct, they are being released directly to the community and they are not going to an RRC?

Mr. WOLF. Right.

Mr. SAMUELS. Okay. We have a couple of choices for the inmate. If their family members are willing to pick the inmate up from the facility we can give authorization for that. If not, then we will work towards establishing transportation to their release destination.

And the follow up question, sir, regarding recidivism in states averages 67 percent.

Mr. WOLF. So they are, they have a higher rate. What is the best state in the union? That is the best State?

Mr. KANE. The best jurisdiction, actually, is the Federal Bureau of Prisons.

Mr. WOLF. No, other than the Federal Bureau of Prisons. What—

Mr. KANE. That I do not know offhand, sir.

JUSTICE REINVESTMENT EFFORTS

Mr. WOLF. Organizations like the Pew Center on the States and the Council of State Governments are promoting innovative justice reinvestment efforts in populations and jurisdictions. States like Kansas, Texas, Ohio and North Carolina have demonstrated how data-driven justice reinvestment strategies can have a remarkable impact on prison population and cost. Kansas emphasized pre-release treatment programs. Texas expanded the capacity of mental health. Ohio strengthened supervision of high-risk offenders. North Carolina—and they did many other things as well—empowered probation officers to employ swift and certain sanctions. If the Bureau of Prisons did everything that all these people were doing, what would the results be? I mean, could you basically take all the recommendations of the Pew Foundation and the Council of State Governments and overlay them on the Bureau of Prisons and do them?

Mr. SAMUELS. Yes, sir, and I would add that some of the initiatives that the states are doing are initiatives that the Bureau has been doing for years. I mean, for example, the treatment programs and good conduct time credits that have been identified for Kansas.

But the significant savings that the states realized were through other changes in areas such as pre-trial diversion programs and supervised release, and these are areas outside the scope of authority for the Bureau of Prisons.

Mr. WOLF. Because of statutes?

Mr. SAMUELS. Yes, sir.

Mr. WOLF. Have you asked for a legislative package or change?

Mr. SAMUELS. These are conversations that I know are occurring, and theoretically they are issues and concerns that we believe, if there's going to be a reduction in our prison population regarding crowding, that we are doing as of right now, everything within our authority to do. GAO acknowledged that, with their procedures that we have in place, that we have done just about everything.

Mr. WOLF. But there's nothing, and I'm not asking, but so there's nothing in the Pew and Council of State Governments that you guys found creative, different, exciting, interesting, that can really help make a difference in the Bureau of Prisons?

Mr. SAMUELS. I believe there are things within the study that would be of benefit to the Bureau of Prisons.

Mr. WOLF. Why wouldn't you do it? I mean, now that you're a new director, why wouldn't you do that? Why wouldn't you just—

Mr. SAMUELS. The front end initiatives would definitely help, you know, with alternatives to incarceration. As director of the Bureau of Prisons, obviously, sir, I don't have the authority for those.

Mr. WOLF. I understand that. Right. Some of that couldn't be done by executive order? Could you have a pilot or something to see? You know, I guess what I'm trying to drive at is that I think you guys are doomed forever if you don't take advantage of this opportunity of Pew and Council of State Governments and the language that the Committee gave you.

Prisoners really don't have a lobby. I mean, obviously, they have committed crimes. My dad was a Philadelphia policeman. I believe in being very tough on criminals. But I also believe the purpose of prisons is rehabilitation, and to assure that when offenders get out, they do not commit a crime against citizens.

So I think this is an opportunity. The Pew people and the Council of State Governments did a good job. I don't know if the Committee looked at a lot of their work. I know Mr. Fattah did, and I think you ought to take a look at everything there that could possibly work. Again, I'm a conservative, a Republican. I believe in being very tough on crime. I believe in justice, but also in rehabilitation, and I've been a long-time admirer of Chuck Colson.

FAITH-BASED PROGRAMS

It almost seems true that the Bureau of Prison's fear is faith. I mean, I remember we did some language to do some faith-based programs. Do you still have a good faith-based program down in Petersburg?

Mr. SAMUELS. Yes, sir, and I——

Mr. WOLF. Is it working?

Mr. SAMUELS. Yes, sir, and I'm very supportive of faith-based programs because they do work.

Mr. WOLF. Yeah, how much does a faith-based program, if you can generalize, reduce recidivism?

Mr. SAMUELS. We're in the process of conducting a study to identify that.

FEMALE INMATES

Mr. FATTAH. Mr. Chairman, can I get a quick question? Women. Female inmates. What's the growth rate? Is this a significant growing population in the Federal prisons as it is in the state prisons?

Mr. SAMUELS. Right now they make up six percent of our total population.

Mr. FATTAH. So we were looking at that over the last ten years. Has it gone up? Has it gone down? Is it staying the same?

Mr. SAMUELS. It's stable.

Mr. FATTAH. Okay, and some of these analyses have been looking at women in relationship to their children and access to their children, particularly in the drug treatment realm. You don't have to get into it now, but if you could submit to the Committee information about what the programming is vis-à-vis women inmates.

[The information follows:]

BOP PROGRAMS FOR FEMALE INMATES

The Bureau of Prisons offers several national and local programs to support the needs of the female offender population. These programs, as described below, are designed to address a variety of issues to include institutional adjustment, reentry skill development, cognitive deficits, and mental illness.

- *Mothers and Infants Nurturing Together Program.* The program allows eligible minimum security level pregnant offenders to reside at a Residential Reentry Center with their newborn to allow the offender to bond with the child and learn parenting skills.
- *Parenting Program.* The program provides offenders with basic parenting skills to develop and maintain the ability to foster a healthy relationship with their children during incarceration and release.
- *Life Connections Program.* A residential faith-based reentry program to foster personal growth and responsibility through interactive journaling, one-on-one mentoring and group sharing which is offered at FMC Carswell.
- *Threshold Program.* A non-residential faith-based reentry program addressing the holistic needs of female offenders preparing for release, which is offered at seven female institutions.
- *Mental Health Treatment.* Basic outpatient mental health services are offered at all BOP facilities. Inpatient mental health services are offered at FMC Carswell.
- *The Resolve Program.* This program provides psycho-educational and group counseling to female offenders with a history of trauma-related mental illnesses. The Resolve Program was expanded in FY 2010 to operate in a total of ten female institutions.
- *Drug Education.* This program encourages offenders with a history of drug use to review the choices they have made and the consequences of their choices including their choice to use drugs.
- *Residential Drug Abuse Program.* This program operates at ten female facilities providing intensive residential treatment to all women in BOP who qualify and volunteer for the program.
- *Dual Diagnosis Residential Drug Abuse Program.* This program is operating at FMC Carswell, and offers treatment to those who suffer with dual disorders of mental health and drug addictions.

- *Sex Offender Management Program.* This program provides cognitive-behavioral, sex offender treatment services for female sex offenders (operational in FY 2012 at FMC Carswell).
- *Federal Prison Industries.* This program offers female offenders opportunities for employment in a variety of positions in operations such as: call center operators, data processing centers, fulfillment centers, clothing and textile factories.
- *Education.* All facilities offer classes in English-As-A-Second Language, General Educational Development, and Adult Continuing Education classes.
- *Vocational Training.* Various vocational programs are offered locally at female institutions depending on local resources. Programs may include: Culinary Arts, Horticulture, Law Clerk, Cosmetology, Plumbing, HVAC, Electrician, and Teacher's Assistant.
- *Canine Programs.* Several institutions offer dog training programs (Paws4prisons or Puppies Behind Bars) in conjunction with local colleges and universities.

SUBCOMMITTEE SUPPORT OF BOP CHALLENGES

Mr. FATAH. I know this is probably not the most pleasant work in the world but it's got to be done and you're the one who's doing it. I'm sure there are other challenges, and the Committee's interested in helping you. I'm going to restate that.

I don't know how this works with OMB, but if there are things that we can do to help you think through this process, we'd like to do it. I'm very interested in what the educational attainment rate is of these 217,000 people you have. How many have graduated high school? We have more than 10,000 courses online now available. You don't need an instructor. It's available information that's accessible and whatever level a person may be at they can make tremendous progress.

So, there are things that we can do, that we want to do, and I just want to invite you again to feel free within the strictures of how the Department operates to share that information with us, with the Chairman. Thank you.

PRISON FELLOWSHIP

Mr. WOLF. I've been to some of the Prison Fellowship programs and I've been very impressed, and I don't know why this government is so afraid of faith. People talk about their faith and people get nervous. They say the word "Jesus" and they just kind of want to go to the door. I've talked to prisoners who really felt that the fact that there was a Bible study made a difference. The fact that Prison Fellowship got active with them and made a difference.

The Angel Tree program, I almost think government is afraid of that. I hope you'll keep me up to date on the faith-based programs to see. I would almost turn the prison over to a prison fellowship or a group like that that wanted to operate to see if the rehabilitation rate would dramatically change. But I think Chuck Colson and his group have done an incredible job.

GOOD CONDUCT TIME PROPOSALS

Let me go to sentence reduction. The Federal prison system is nearly 40 percent over capacity. During the fiscal year 2012 appropriations cycle, the Department of Justice shared two new proposals designed to slow inmate population growth in our Federal prisons. One would increase the amount of time an inmate can earn for good conduct and the other would provide sentence reduction credits for participation in educational or vocational programs. These proposals were not embraced by our authorizing committee.

Once again, the Department of Justice has included proposals in its request and as a result built a \$41 million offset into the BOP budget. Does the Bureau of Prisons have reason to believe this authorizing legislation will be more successful in gaining the support of the authorizing committee this year?

Mr. SAMUELS. We're hopeful.

Mr. WOLF. But where are all these big silk stocking lawyers that are defending the Guantanamo Bay guys? Why aren't they coming in and working to try to bring things like this that would actually help the prisons? You just can't be hopeful. You've got to send the team up here. You ought to be sitting down with the authorizers,

explaining what this means for savings for the taxpayer, what it means for less crime,

Mr. SAMUELS. And sir, as you stated, I mean, there would be significant savings because it would remove approximately 4,000 inmates.

Mr. WOLF. Four thousand, and if it would really remove 4,000, how much would that save a year?

Mr. SAMUELS. Forty one million dollars.

Mr. WOLF. Forty one million dollars a year. That's a lot of money, and in the process these people would be, would be participating in programs that would mean what, when they get out of prison?

Mr. SAMUELS. They'd be successful.

Mr. WOLF. Be successful, and therefore less likely to reoffend?

Mr. SAMUELS. Crime, and victimization.

Mr. WOLF. I mean, I just think it's so natural that I think it's just—

Mr. SAMUELS. Mr. Chairman, I would—

Mr. WOLF. Excuse me, and I think that people ought to go to the chairmen of those committees and sit down with them and explain this. Go ahead. Excuse me.

JUSTICE REINVESTMENT EFFORTS

Mr. SAMUELS. I wanted to revisit your earlier question on what the Bureau of Prisons is doing, in reference to what some of the states were doing. I stated, there's not a whole lot within my authority in dealing with the issues on the front end, when you're dealing with probation and pre-trial diversion, as well as on the back end, when you have the supervised release revocations occurring. That's the responsibility of the USSC and courts.

Now, one thing I have done and I will continue to do, is that I have pretty much mandated within the Bureau of Prisons that our wardens and various staff go out and observe the reentry courts to have a larger understanding of the entire process and how we can continue to work together with the judiciary, those who are interested and are supportive of looking at the various opportunities that are available. In the Bureau of Prisons, when we send inmates out to RRCs, we are evaluating how effective we are in determining when we send individuals back for some of the minor or technical violations. Because we, on average, are receiving about 10,000 or so inmates coming back into the system every year.

If we can work with those individuals and really push hard to ensure that when they are out there, they're successful. Because I've explained to my staff that we get no benefit if we are putting these individuals out and we don't do everything that we can to try to work with them.

Now, public safety is always going to be at the forefront, because we do not want to jeopardize anyone's safety. But if these individuals are low risk, low need, and they can continue to be out in the community where they need to be so they can get jobs and be productive, I mean, that's what we want. I think that's what everyone wants. There has to be dialogue for individuals to see that this is a very large issue. I do not want during my tenure as the Director, to see where years from now I'm continuing to come in to say that

these numbers are so significant. We're dealing with crowding issues because I'm deeply concerned about the safety of the staff in the facilities as well as the inmates, making sure that we have a safe, secure environment.

When you have inmates who are continually being pushed into the Federal system, or I'll say any correctional system, there's only so much that you can do when you're trying to maintain a positive environment. When you have numerous inmates who are trying to do whatever they can to have opportune times to use the telephone, to use the restroom facilities, going to eat food, crowding causes concerns there. The inmates in detention—that is something we don't want—because we do not want to foresee where it gets to a point where we fail: with all of the contingencies we put in place, ensuring that we are trying to be as cost effective as we can, and everybody working together to do that. I mean, we've been successful. But at some point, you can only do that for so long.

As you've stated, and for the record, we have no new facilities in line for construction. I would hope, and my goal as the Director for the Bureau of Prisons, and I would say a goal that I take on with full commitment, is that I want to see the inmate numbers reduced. I want to be able to say that we do not need to expand the Federal prison system, that we maintain and deal with the individuals who are the most egregious within our society. You know, those who commit violent crimes and deal with those individuals.

But for inmates that we can push out if our reentry efforts are really working, and we are identifying and working with these inmates who come in with low skill sets and don't really have structure within their environment prior to coming to the prison, and we can give them that, that is what we're working towards. That is a goal and an objective that I have as Director. I expect for all the staff in the Bureau of Prisons to help me meet that goal. But we're not going to be able to do it alone.

PEPPER SPRAY AND ASSAULTS

Mr. WOLF. Mr. Griffith, a colleague of mine from the Virginia delegation, raised questions and I said I would ask them, about whether a Federal correction officer should be permitted to carry pepper spray in order to be well equipped to deal appropriately with inmate hostility.

As you know, on October 21, 2011, at the U.S. Penitentiary in Lee County, Virginia, Correctional Officer Aaron Delp, was attacked by an inmate with an improvised weapon. He suffered multiple wounds to the face and is lucky to be alive today.

Do you think Officer Delp may have been better able to defend himself by using pepper spray on his attacker? And let me just take the second part of that. They said that many State correction officers carry pepper spray on duty, including officers in Virginia prisons.

Do you know what the experience with pepper spray has been at the State level with whether pepper spray has been an effective tool and are there other non-lethal defense instruments the Bureau of Prisons allows or is considering so that BOP officers can do their job more effectively and to be safe? So do you just kind of want to

sum those three things up together? You do not allow pepper spray now, I understand. Is that correct?

Mr. SAMUELS. Correct.

Mr. WOLF. Have you considered it, or could you, and I'm going to ask you at the end if you would take this back and look at it and just let me know or let Congressman Morgan Griffith know what you're thinking one way or the other. But do you want to comment on this issue?

Mr. SAMUEL. Yes, sir. In reference to the pepper spray, that has been a concern raised for implementation within the Bureau of Prisons, and I am aware that there are some State systems that utilize it.

We do have within the Federal prison system, contingencies for the use of less lethal weapons to ensure the safety of our staff and responders in these situations.

Historically, for the Bureau of Prisons, we have always worked towards empowering our staff in the prison environment to use effective communication to de-escalate situations. I think with any given situation, that can go only so far, and as stated earlier, that there are inmates, as I think everyone knows, within any prison setting, who are not going to follow the rules and who can react. I think the training that we provide our staff in situations like that is to immediately remove themselves from that situation, or not to approach individuals if they believe that there is any imminent threat. There are communication tools that we have for our staff, working in many of the housing units and various posts within the facility, to reach out for assistance to handle a situation.

I think that for any staff member, or anyone in general, to take on a defensive posture with an inmate is really not something that we would advocate for our staff to do. I mean, we would prefer that they remove themselves from the situation and if this concern continues, obviously we will continue to evaluate and to look at any possible measures, because the safety of our staff is always very important. One of the most significant objectives I can tell you, as the Director, and I think for all of our leadership and wardens out there working with our staff is to make sure that their safety is always first.

Mr. WOLF. How many prison guards have been assaulted in the last ten years and how many have been killed?

Mr. SAMUELS. Within the last ten years, we've had one homicide, and that occurred at USP Atwater in California.

Mr. WOLF. And how many assaults where there have been bodily injury, like this one here. Are you familiar with this one in Lee County? At the U.S. Penitentiary in Lee County?

Mr. SAMUELS. Yes, sir.

Mr. WOLF. So how many have been seriously injured? How many guards have been assaulted and seriously injured?

Mr. SAMUELS. I'm aware of assaults on staff, which they can range from minor assault to significant assault. For the record I'd have to submit, to give you an accurate account, for that number. But we take any assault, you know, on our staff seriously and inmates should be held accountable for their actions with that. It's not something that we take lightly, the inmates should be held accountable.

[The information follows:]

NUMBER OF SERIOUS ASSAULTS ON STAFF WITHIN THE LAST TEN YEARS

The following chart displays statistics related to serious assaults on staff over the last 10 years.

SERIOUS ASSAULTS ON STAFF *

Fiscal Year	Serious Assaults on Staff	Serious Assaults on Staff per 5,000 Inmates
FY 2002	145	5.08
FY 2003	130	4.27
FY 2004	104	3.23
FY 2005	137	3.99
FY 2006	110	3.09
FY 2007	79	2.14
FY 2008	114	3.02
FY 2009	110	2.87
FY 2010	91	2.32
FY 2011	52	1.31

* The information displayed above is from SENTRY'S automated Chronological Disciplinary Record data.

Mr. WOLF. Would you know whether the inmate involved in this with Aaron Delp was punished for this? I mean, do you know the details, or does anyone?

Mr. SAMUELS. I'd have to follow up with the details but with any actual assault we would refer it to the FBI for prosecution. If they declined to accept the case then we would administratively deal with inmates who pose any threat to our staff.

Mr. WOLF. Well, could you look into this case? It was October 21, 2011. U.S. Penitentiary, Lee County, and Aaron Delp. If you would just give us what happened and then if you can explain to us the policy, or just look at the whole pepper, pepper spray issue.

[The information follows:]

DETAILS OF STAFF ASSAULT AT USP LEE AND PEPPER SPRAY ISSUES

On October 21, 2011, Officer Delph was assigned as the K General population housing Unit Officer (4 pm -12 am). The Officer was monitoring the end of the 7:00 pm controlled inmate movement when he told an inmate the movement was closed and the inmate would not be able to move until the next controlled movement at 8:00 pm.

At approximately at 8:25 pm, the inmate entered the Unit Officer's station to confront Officer Delph and assaulted him. The Officer removed the phone from the receiver to signal an alarm in the Control Center. The Officer then created enough distance between himself and the attacker to begin proceeding toward the safe haven. The inmate pursued the Officer with a homemade weapon, stabbing him repeatedly in the upper torso and facial areas.

Responding staff observed blood in the Unit Officer's station, and proceeded to conduct a search for the staff member. The Control Center Officer informed responding staff of Officer Delph's location and responding staff proceeded toward the safe haven. Responding staff gave the inmate multiple commands to put down the weapon and submit to hand restraints, at which time the inmate began to attack responding staff. Another staff member fell to the ground and fractured his wrist while trying to defend himself from the attacking inmate. The inmate was subdued and restraints were applied. He was transferred to another high security facility later that evening.

Officer Delph sustained multiple puncture wounds to his upper torso and received multiple lacerations to his face requiring several stitches to his upper lip, forehead and below the left eye. He was transported via government vehicle to the local hospital for further treatment and released the same night. Officer Delph has returned back to full duty as of January 04, 2012.

The case was referred to the U.S. Attorney's Office for the Western District of Virginia for prosecution and is ongoing.

Current BOP regulations and policy support the use of pepper spray in limited situations. An institution's Warden may authorize the use of pepper spray or non-lethal weapons when an inmate (see C.F.R. 552 - Custody, Subpart C - Use of Force and Application of Restraints on Inmates):

- a. Is armed and/or barricaded; or,
- b. Cannot be approached without danger to self or others; and,
- c. It is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage.

The Warden may delegate the authority for use of pepper spray or non-lethal weapons to one or more supervisors on duty and physically present, but not below the position of a Lieutenant. BOP continues to evaluate the use of pepper spray in other situations and consider the possibility of expanding current regulations and policies. Part of this consideration is how to best protect the safety of staff and inmates.

Mr. WOLF. I'm going to end in a couple more, but if Mr. Fattah, or Mr. Serrano, have any questions?

Mr. FATTAH. No.

Mr. SERRANO. No.

Mr. WOLF. No? Okay. We're going to do a number on the security issues. We'll just put them in the record on prison security and safety.

PRISON RAPE ELIMINATION ACT

Over a year ago, the Department of Justice published a long-awaited Proposed Rules on National Standards to Prevent, Detect, and Respond to Prison Rape. The comment period ended last spring. The bill passed in 2003. When the proposed rule was released, DOJ estimated that the final rule would be published before the end of 2011. By all accounts, the final rules should be published soon. Once published, the PREA standards will be immediately binding on the Bureau of Prisons.

Are you prepared to comply with the regulations and have you been kept up to speed?

Mr. SAMUELS. Yes, sir.

Mr. WOLF. Which office will be charged with overseeing compliance of PREA?

Mr. SAMUELS. We've established a position within the Bureau of Prisons to monitor PREA standards for the agency in that position. It's located in the Correctional Programs Division of the Bureau of Prisons.

Mr. WOLF. So nobody thinks we've overstated the problem over the years? You would acknowledge this is a serious problem?

Mr. SAMUELS. I would acknowledge, sir, that this is an area where, as an agency, we have zero tolerance. And that there are a lot of the recommendations in the standards that we already have within our policy and procedures.

Mr. WOLF. But how many people have been raped in the Federal prisons in the last ten years? Men and women?

Mr. SAMUELS. I'd have to submit to the record.

[The information follows:]

NUMBER OF INMATES RAPED IN FEDERAL PRISON IN LAST TEN YEARS

The Prison Rape Elimination Act of 2003 (PREA; PL 108-79) requires the Department of Justice to report on the incident rate of sexual violence in U.S. prisons. Since 2004, the first year PREA data was reported, data collection methods have improved. As the numbers below indicate, a majority of the cases reported in federal prisons are not substantiated—whether from lack of evidence, lack of validity or various other reasons.

INMATE-ON-INMATE NONCONSENSUAL SEXUAL ACTS ¹

Year	Reported	Substantiated ²	Unsubstantiated ³	Unfounded ⁴	Investigation Ongoing
2004	17	0	n/a	n/a	0
2005	25	5	n/a	n/a	0
2006	7	0	n/a	n/a	0
2007	19	0	n/a	n/a	0
2008	74	1	51	21	1
2009	58	0	42	16	0
2010	81	1	59	21	0

Notes:

¹ The data above is from a Bureau of Prisons' (BOP) administrative record review. The table is for the more serious offenses and not sexual contact or harassment. BOP is unable to differentiate between "Unsubstantiated" and "Unfounded" incidents reported 2004–2007.

² Substantiated incident: the agency made a finding that the event did actually occur.

³ Unsubstantiated incident: the investigation failed to yield sufficient evidence to determine one way or the other whether the alleged incident actually occurred.

⁴ Unfounded incident: the investigation determined that the alleged incident did not actually occur.

Mr. WOLF. Roughly. I thought you know. What would you think?

Mr. SAMUELS. Yes. I am aware, and again, sir, I have to get you the exact numbers. But I know, compared to the states, the Bureau of Prisons is the lowest of all the correctional components for these types of incidents occurring within a prison setting. So, it is something that we believe is important, that needs to be tracked, as well as ensuring that inmates have the appropriate measures to report.

One of the things I'd like to add is that in the letter that I submitted to the inmate population, the PREA issues were addressed, and I told the inmates that if they believe that there's someone who is going after them in any particular way, or pressuring them, that they need to let us know and we want to pull those perpetrators, when they are identified, out of the general population and deal with those individuals for that type of behavior. It's not behavior that we condone. It's not good for the environment.

Mr. WOLF. Right. But you would acknowledge that it's a very difficult issue to deal with. An inmate get a letter from the head of the Bureau of Prisons and is supposed to come forward and say, here's the problem.

Mr. SAMUELS. And it was a letter from me for situational awareness, which I explained to them, and it's not just with the inmates. I wanted the inmates to hear from me that I believe that this is something very important.

Mr. WOLF. And the guards. Sure.

Mr. SAMUELS. Their safety, as well as our staff. So this is a conversation, Mr. Chairman, that we will continue to have, because I believe it is our duty and obligation to protect those individuals who have been placed in our care in not allowing this activity to occur.

Mr. WOLF. Well, if you could just submit for the record and as things come out, just call us and let us know what the number was, say, over the last ten years and each and every year.

REPATRIATION OF GOODS

Did you ever find out about the hat, just out of curiosity?

Mr. SAMUELS. Mr. Chairman, the ball caps are imported, and UNICOR inmates do the embroidery.

Mr. WOLF. They're imported?

Mr. SAMUELS. Right.

Mr. WOLF. That means they're not made in the United States? I rest my case. I think we should make every effort to do it in a way that creates jobs in the private sector and brings it together to reduce recidivism or rehabilitation and, so people, when they get out of prison, commit less crime and in the process save the American taxpayer a lot of money and create jobs here in the United States. Just walk into Walmart. Saturday, go into Walmart. About 5,000 of the 6,000 jobs of the products in Walmart are made in China. I was in a Chinese prison, Beijing Prison Number One, where they were making socks for export to the United States.

They were all Tiananmen Square demonstrators. Next time you come by my office I'll show you the socks. They were all Tiananmen Square demonstrators. Senator Moynihan got up on the floor during a debate and held the socks up. Tiananmen Square demonstrators were making the socks. They had golfers on the side. They didn't play golf in those days, so basically slave labor of the young Chinese students who favored democracy were making socks for export.

Many of the flowers that you buy in these stores, these plastic flowers, are made, some are made with slave labor in what they call laogai. We're not talking about that here. We're talking about honest, dignified jobs.

So I think the administration can create jobs in America but also enable rehabilitation, if we can move ahead, and I hope you'll be proactive. The Attorney General seemed very, very sympathetic. I haven't found a lot to work with the Attorney General on. We've had differences on some of the issues. But he seemed very sincere on this, and I said I would even, you know, help him and do everything I possibly can. And lastly, in this time of very difficult budgets, we can save money.

Also, you may have seen that, if you have an iPad?

Mr. SAMUELS. Yes, sir.

Mr. WOLF. It's made in made in a place called Foxconn in China where the suicide rate is at an all time high. Do you have an iPhone?

Mr. SAMUELS. Yes, sir.

Mr. WOLF. It's made there, too. I mean, so with that, if you have any other—

Mr. SERRANO. No, but I'm having my iPad.

Mr. WOLF. We are having a hearing. We're having a hearing here, and Mr. Fattah, the work goes on it. There was an article in the *New York Times* where Steve Jobs was asked by President Obama, can you bring, how do you bring the jobs back? And Steve Jobs said, you can't.

So, in this hearing, NSF and others are coming together to tell how we create jobs. Two weeks after the exchange between President Obama and Steve Jobs, there was an article showing the conditions in that factory, 12 hours a day, where they wake them in the middle of the night. The suicide rate is at an all time, I mean, it's unbelievable. We'd like to come up with some idea whereby the iPad or the iPhone could be made here in the United States and not in China.

CLOSING REMARKS

Anyway, I thank you for your testimony. Please thank, you know, the men and women of the Bureau of Prisons.

Mr. FATTAH. I thank the Chairman for a good hearing.

Mr. WOLF. Thank you.

Mr. SAMUELS. Thank you.

QUESTIONS FOR THE RECORD—MR. WOLF

UNICOR

Question. The UNICOR Bonding Program helps ex-offenders who previously worked in Federal Prison Industries find work. Can you describe this program? How successful has the UNICOR Bonding Program been?

Answer. Federal Prison Industries (FPI) established the UNICOR Bonding Program in 2006 for federal prisoners released after February 1, 2006 and employed by FPI at least six months, consecutively or cumulatively, during their incarceration. It provides \$5,000 “fidelity bond” insurance to employers that hire ex-federal offenders. These bonds are to be issued at no cost to employers as a job placement incentive and cannot be resold by the purchaser. The bonds are insurance policies of Travelers Property Casualty. The McLaughlin Company is the agent for Travelers Property Casualty in issuing the bonds and determines eligibility for the UNICOR Federal Bonding Program, and ex-offenders have up to a year after release from a federal prison to apply for a bond.

BOP’s Inmate Transition Branch (ITB) administers the Bonding Program. To date, four ex-offenders have been covered by the program. ITB issued bonding stamps in 2006 (1), 2010 (2), and 2011 (1). No claims have been filed to date. Many ex-offenders may be seeking employment opportunities that do not require bonding or if required, some companies may already have an in-house bonding program and may not seek UNICOR bonding. To promote reentry efforts, this program has remained in place and is available for eligible ex-offenders. Information on the Bonding Program is provided to BOP staff, including UNICOR job supervisors, to UNICOR inmate employees and to company representatives participating in mock job fairs.

DRUG TREATMENT

Question. What percentage of eligible inmates receives drug abuse treatment in FY 2012? What percentage of eligible inmates will receive this important service under the FY 2013 budget?

Answer. The Bureau of Prisons will provide drug treatment to 100% of all eligible inmates in FY 2012 and anticipates doing the same in FY 2013.

Question. Which, if any, of the inmates that participate in the residential drug abuse treatment program are eligible for a sentence reduction as a result of successful completion of the program, and how much can their sentences be reduced?

Answer. Approximately 70 percent of the inmates who participate in the RDAP are eligible for the sentence reduction. An inmate eligible for a sentence reduction who completes the RDAP may receive up to 12 months off his/her sentence. Historically, BOP has not been able to provide the full 12 month credit (average 9 months in FY 2011 and FY 2012). With the additional RDAP funds requested in the FY 2013 President's Budget, BOP will be able to provide the full 12 month credit in FY 2014.

The 30 percent who are not eligible fall into one of the categories listed in §550.55(b) of the Code of Federal Regulations, Inmates not Eligible for Early Release. As an exercise of the Director's discretion, the following categories of inmates are not eligible for early release:

- Immigration and Customs Enforcement detainees (in BOP custody, but held on an administrative immigration charge);
- pretrial inmates;
- contractual boarders (inmates in BOP custody on contract from the states or military prison system);
- inmates with a prior felony or misdemeanor conviction for:
 - homicide;
 - forcible rape;
 - robbery;
 - aggravated assault;
 - arson;
 - kidnapping; or
 - an offense that by its nature or conduct involves sexual offenses committed upon minors.

Also, Inmates who have a current felony conviction for the following are not eligible for a sentence reduction:

- an offense that has an element, the actual, attempted, or threatened use of physical force against the person or property of another;
- an offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device);
- an offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or
- an offense that, by its nature or conduct, involves sexual abuse offenses committed upon minors;
- inmates who have been convicted of an attempted conspiracy, or other offense which involved an underlying offense listed above;
- inmates who previously received an early release under 18 U.S.C. 3621(e);

- inmates who do not have a diagnosis of a drug use disorder as defined by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, fourth edition;
- inmates who committed a federal offense prior to November 1, 1987, before the effective date of the "Sentencing Reform Act of 1987;" and DC Code Offenders committed before August 5, 2000.

SENTENCE REDUCTIONS AND GOOD TIME CREDIT

Question. Under current "compassionate release" policies, BOP may release inmates who are terminally ill or otherwise eligible for early release due to "extraordinary or compelling circumstances." Criteria for release under these circumstances are established both in law and administrative policy. Your budget proposes to expand the compassionate release program to achieve a savings of about \$3 million. In what ways would you expand the program?

Answer. The Department of Justice and the Bureau of Prisons continue to review and consider options for expanding the program; however, a final decision has not been made at this time.

Question. Can you describe the current state of BOP's low security prisons in terms of crowding?

Answer. As of March 22, 2012, BOP's low security prisons are crowded 38 percent over rated capacity. For low security prisons, rated capacity assumes 100 percent double bunking. The current 38 percent crowding rate means that about 80 percent of inmates in BOP's low security prisons are triple-bunked or in some cases inmate overflow must regularly be housed in space not originally designed for that purpose (e.g., television rooms, open bays, program space).

Question. On February 7 the GAO published a report documenting the BOP's use of programs that would cut costs of incarceration and the challenges BOP faces in fully utilizing its authority to reduce inmates' time in prison. What are some steps BOP is currently taking to help mitigate the effects of crowding in its facilities?

Answer. BOP has taken a variety of steps to help mitigate the effects of crowding. For example, BOP has improved the architectural design of its newer facilities and taken advantage of improved technologies in security measures, such as perimeter security systems, surveillance cameras, improved body alarms and equipment to monitor communications.

BOP also began operating Special Management Units (SMUs) in FY 2008. SMUs are designed to confine inmates who have proven to be violent or confrontational, resistant to authority and who continually disregard

institution rules. SMUs help mitigate the impacts of overcrowding by removing disruptive inmates from other existing institutions and placing them in an environment that has greater management of their interaction in order to ensure the safety, security and orderly operation of BOP facilities.

Finally, the FY 2013 Budget requests \$81.4 million to increase BOP's capacity through new prison activations and by adding private contract beds.

PRISON SECURITY AND SAFETY

Question. What kinds of improved technologies have most enhanced BOP's population management and inmate supervision strategies?

Answer. Improved security technologies that have most enhanced BOP's population management and inmate supervision strategies include: perimeter security systems, surveillance cameras, improved body alarms and equipment to monitor communications. BOP has also enhanced population management and inmate supervision strategies in areas such as classification and designation, intelligence gathering, gang management, use of preemptive lockdowns, and more controlled movement and use of Special Management Units.

Question. What is the biggest challenge in managing the federal prisoner population at higher security levels?

Answer. The BOP's biggest challenge is managing the continually increasing federal inmate population, and providing for their care and safety, as well as the safety of BOP staff and surrounding communities, within budgeted levels. Managing the federal prisoner population at higher security levels places more demands on staff because inmates in higher security levels tend to have been convicted for more serious offenses and have violent histories.

At the medium security level:

- about 66 percent (41,200) of the inmates are drug offenders or weapon offenders
- 42 percent (26,300) of all medium security inmates have been sanctioned for violating prison rules
- 76 percent (47,500) of all medium security inmates have a history of violence

At the high security level:

- more than 70 percent (16,700) of the inmates are drug offenders, weapons offenders, or robbers
- another 10 percent (2,400) have been convicted of murder, aggravated assault, or kidnapping
- 70 percent (16,700) of all high security inmates have been sanctioned for violating prison rules

- 90 percent (21,500) of all high security inmates have a history of violence

Moreover, compared to lower security level facilities medium and high security institutions have a higher incidence of serious assaults by inmates on staff. In FY 2011, 78 percent of serious assaults against staff occurred at the higher security levels (17 percent at medium and 61 percent at high security facilities). Serious assaults are defined as assaulting any person, or an armed assault on the institution's secure perimeter (a charge for assaulting any person at this level is to be used only when serious physical injury has been attempted or accomplished).

Question. According to your budget request, BOP expects an increase of about 11,500 inmates between FY 2012 and the end FY 2013. On average, how does such a number break down in term of low, medium and high security inmates?

Answer. On average, about 40 percent of the net increase in inmates will be in higher security levels (11 percent high and 29 percent medium). The remainder will be lower security inmates (39 percent low and 17 percent minimum) or other/administrative (4 percent).

CONTRACT CONFINEMENT

Question. The budget requests an increase of \$25.9 million to procure 1,000 new contract beds. Under what circumstances is contract confinement of inmates most cost-effective?

Answer. Contract confinement is most cost-effective when it is used to acquire privately operated beds to confine male low security criminal aliens. The great majority of inmates in BOP contract facilities are male low security short-term sentenced criminal aliens. These inmates are particularly well suited to contract confinement because their typically short sentence lengths and alien status generally precludes them from participating in sentence and recidivism reducing programs. By contracting out beds for male low security criminal aliens, space is made available for inmates who are eligible for such programs. There are over 10,000 low security male criminal aliens currently housed in BOP facilities and adding 1,000 low security contract beds helps to reduce crowding in BOP low security facilities and system-wide. At the end of FY 2011, low security overcrowding was 39 percent, which equates to 81 percent of the inmates being triple bunked, or in some cases inmate overflow regularly being housed in television rooms, open bays, program space, etc.

Question. How many total contract beds are funded under BOP's current services level?

Answer. FY 2013 current services would continue current operations. As of March 22, 2012, BOP houses 40,547 inmates (18.6 percent of the total population) in contract confinement. This includes privately operated facilities, residential reentry centers and contracts with state and local facilities. The FY 2013 President's Budget requests a \$21 million base adjustment to continue to support this number of contract beds.

Additionally the President's Budget requests \$26 million to add 1,000 privately operated contract beds.

QUESTIONS FOR THE RECORD—MR. FATTAH

INMATE SKILLS DEVELOPMENT INITIATIVE

Question. In a July 2010 report (GAO-10-854R), the Government Accountability Office (GAO) recommended that BOP develop: (1) a plan for implementing its Inmate Skills Development Initiative (ISDI) with key tasks, responsibilities and timelines; and (2) a comprehensive cost estimate for completing the remaining ISDI requirements. Also according to GAO, BOP developed a plan for the ISDI in April 2011 that provides details on program priorities and implementation steps, but which did not contain timelines for activities; specify responsibilities for the completion of tasks; or provide full lifecycle costs. What is the current status of BOP's response to GAO's recommendations?

Answer. The successful reentry of offenders returning to the community has long been a part of BOP's mission and routine activities. The April 2011 ISD/Reentry implementation plan, a multi-year initiative, outlines objectives that would further strengthen offender reentry. This plan was included in BOP's April 2011 response to GAO. The plan incorporated the specific disciplines and staff responsible to achieve the desired objectives. The Administrator of each branch listed is responsible for ensuring their branch's assigned steps are completed. BOP and GAO discussed the April 2011 response at the first follow-up meeting with GAO, which was on March 9, 2012.

Cost estimates and an implementation plan were included in our April 2011 response. The cost estimates were provided throughout the plan and were based on staff time, equipment, supplies. A notation was included if costs were not available (e.g., contractor costs). Cost estimation was also discussed at BOP's initial March 9, 2012 meeting with GAO and a subsequent meeting on April 30, 2012. GAO has stated that the two recommendations will be closed out upon receipt of some BOP summary information. BOP will provide the information by the end of May.

Question. By when does BOP expect to submit to GAO all of the information necessary to close these recommendations?

Answer. BOP anticipates receiving additional information and feedback from GAO at a cost estimation meeting tentatively scheduled for April 30, 2012. BOP and GAO will be able to determine a timeline for closing these recommendations at that time.

RESIDENTIAL REENTRY CENTERS

Question. What categories of inmates would benefit most from longer stays in residential reentry centers (RRCs)?

Answer. Current risk-need-responsivity (RNR) research suggests that inmates who pose a greater risk for recidivism will benefit most from being released from prison with longer Residential Reentry Center (RRC) stays than will lower risk inmates. RNR research also suggests that low or minimum risk inmates may experience higher risk levels due to a long RRC stay (Lowenkamp and Latessa, 2005). Guided by this research, BOP uses its inmate classification score not only to place inmates in the most appropriate security level institution that meets their program needs, but also as a measure of risk when making decisions about inmates' RRC length of stay.¹

Question. For these categories of inmates, what was the average length of stay in RRCs for the last three fiscal years (FY 2009–2011), and what is the estimated average length of stay for these categories of inmates during FY 2012 and 2013?

Answer. As part of the classification process, inmates are assigned a security level of high, medium, low or minimum. Using the premise that high and medium security inmates are generally more at risk of recidivism, the following data are provided for those categories of offenders.

Estimates for FY 2012 and 2013 are not available as BOP does not know, prospectively, if the community-based placement will be at an RRC, on home detention, or a combination of both. Those figures can be determined only retrospectively, at the conclusion of the community-based placement.

Question. What are the biggest obstacles to increasing the average length of stay in RRCs for these categories of inmates?

Answer. The BOP contracts for RRC beds within budgeted and appropriated resource levels. Extending the length of stay of any category of offender would

¹Lowenkamp, Christopher T., and Edward J. Latessa 2005, "Increasing the Effectiveness of Correctional Programming through the Risk Principle: Identifying Offenders for Residential Placement" *Criminology & Public Policy* 4:263–290.

Table 1: Average number of days in residential reentry centers by security designation

Fiscal year	FY 2009	FY 2010	FY 2011
Medium security offenders	89 days	89 days	92 days
High security offenders	79 days	77 days	75 days

result in fewer overall inmates having access to RRC beds. To increase total RRC bedspace within appropriated resources, BOP works to obtain more cost efficient contracts and to expand in existing locations; however, community resistance to contractors establishing RRCs can be an obstacle.

Question. What was the average length of home detention for low risk offenders during the last three fiscal years (FY 2009–2011), and what is the expected average length of home detention for this subgroup during FY 2012 and FY 2013?

Answer. As part of the classification process, inmates are assigned a security level of high, medium, low or minimum. Using the premise that minimum and low security inmates are generally at less risk of recidivism, the following data are provided for those categories of offenders.

Estimates for FY 2012 and 2013 are not available as BOP does not know, prospectively, if the community-based placement will be at an RRC, on home detention, or a combination of both. Those figures can be determined only retrospectively, at the conclusion of the community-based placement.

Table 2: Number of inmate days in RRCs and/or home detention by security designation

Fiscal Year	RRC/Home detention ^a		Home detention ^b	
	Minimum	Low	Minimum	Low
FY 2009	80 days	84 days	91 days	70 days
FY 2010	75 days	81 days	97 days	97 days
FY 2011	68 days	77 days	79 days	85 days

^aInmate was placed on home detention after being housed in an RRC.

^bInmate transferred directly to home detention from institution (may include a brief stay at the RRC for orientation purposes.)

BOP STAFFING

Question. Excluding prisons in the process of being activated, what is BOP's current total number of on-board correctional workers and what percent of total authorized positions does this represent?

Answer. As of February 25, 2012, BOP onboard base staffing equaled 33,132 full-time correctional workers (excludes central and regional offices, training staff and activating institutions). This represents 89 percent of the Congressionally authorized base correctional worker staffing level.

Question. The authorized base correctional worker staffing level since the beginning of fiscal year 2009, excluding staff at new prisons that have been activated since that time, appears to have gone up by only 242 positions, even though the inmate population has increased by almost 12,000. Is the authorized staffing level for BOP updated regularly based on increases in the inmate population?

Answer. BOP reviews authorized position levels and onboard staffing in response to crowding levels, special situations/circumstances, and security issues. Authorized position levels for BOP facilities are reviewed annually and approved by the BOP Resource Management Subcommittee. In addition, locally and regionally conducted reviews of authorized staffing are completed annually during the development of the Annual Workforce Utilization and Staffing Plan (which is required by BOP Policy) and reviewed quarterly. As BOP identifies required changes in authorized staffing levels, positions are realigned within the region or a request for an increase of authorized positions is submitted for consideration to the Resource Management Subcommittee in the Central Office.

Additionally, the Executive Staff conducts quarterly reviews of each specific security level (institutions that fall under that security level) to include a review of authorized positions and on-board staffing levels. Finally, adjustments are made to authorized position levels when new programs are added, during programming changes (such as changes in security level programming), expansions, and as other needs/changes become identified.

Question. When was the last time BOP or the Department of Justice conducted an analysis of BOP's correctional worker staffing requirements, and what criteria related to safety, security, inmate programming or other factors were used in carrying out the analysis?

Answer. BOP's Correctional Programs Division staff in the Central Office conducts annual reviews of staffing for inmate programs, in addition to locally and regionally conducted reviews of authorized staffing levels completed

annually during the development of the Annual Workforce Utilization and Staffing Plan (which is required by BOP Policy) and quarterly reviews of this plan. For example, the BOP is mandated to provide Residential Drug Abuse Treatment Program (RDAP) for all inmates who need and volunteer for treatment. BOP reviews the RDAP participation rates, waiting list, and anticipated increases in population for upcoming fiscal years to determine if the BOP is able to meet the requirements of the law. Positions are requested and allocated accordingly. The FY 2013 Budget requests 120 RDAP positions to help BOP reach the goal of providing 12-month sentence credits to all eligible inmates.

Likewise, the institutions' staffing of mental health professionals is reviewed annually. This review looks at each institution's current staffing, projected inmate population, and individual institution's mission and security level, to determine the appropriate staffing level for the prevention, intervention, management and treatment of the BOP's population in need of mental health intervention.

Further, BOP internally reviews and adjusts authorized position levels across BOP sites as described in the responses to question 8.

Question. What staffing level did the most recent analysis indicate is needed by BOP and how does such an analysis inform BOP's authorized correctional worker staffing level?

Answer. The FY2013 President's Budget requests \$22 million to increase the BOP's base staffing levels by 210 positions. BOP's analysis indicates that prison safety and operations are impacted by the onboard staffing level. Increases in the onboard staffing level supports inmate and staff safety and will allow BOP to increase inmate programming opportunities. To that end, BOP has focused on filling current authorized positions in order to increase the percentage of staff onboard and the FY 2013 Budget requests resources that will allow BOP to staff correctional worker positions at 90% of the authorized level, which is an improvement from FY 2012 (89% target). In addition, the budget process affords the opportunity to examine the authorized staffing level, adjustments to which are typically made to account for new prison activations or to enhance existing programs, such as the requested \$13 million RDAP increase.

Question. What other factors are considered in determining the authorized correctional worker staffing level?

Answer. BOP management provides oversight of authorized position levels and onboard staffing in response to crowding levels, special situations or circumstances, and security issues. Additionally, adjustments are made to

authorize position levels when new programs are added or expanded, and as other needs/changes are identified.

Question. Is BOP's current authorized correctional worker staffing level an accurate representation of its staffing needs? If not, what does it represent?

Answer. The staffing level requested represents the staffing level BOP needs to operate its prison facilities and provide inmate care, which is why the requested operating funds in the President's Budget request are vital.

Question. What is BOP's proposal for net new correctional worker staffing in FY 2013 for BOP prisons, other than for prisons that are in the process of being activated, and what would be the percentage of on-board versus authorized correctional workers if all of the planned hiring for these prisons is achieved?

Answer. Filling staff positions that have direct contact with inmates to ensure the safety of federal inmates, staff, and surrounding communities remains a BOP priority. Excluding activations, the FY 2013 Budget proposes to add a net 272 FTE. These staffing increases would allow BOP to expand the Residential Drug Abuse Treatment Program (RDAP) and fill vacant positions at existing institutions. These resources will fund correctional worker staffing at 90% of the authorized level, which is an improvement from FY 2012 (89% target).

NEW PRISON CONSTRUCTION

Question. No new funding is proposed in the FY 2013 budget for the construction or acquisition of new prison facilities to help relieve overcrowding, even though BOP has several planned construction projects for which significant funding has not yet been appropriated. In order to maintain BOP's current schedule for constructing new prisons, how much additional funding would BOP need and by when would BOP need it?

Answer. The BOP has seven projects that are funded for preliminary planning and studies. To fully construct these facilities, a three year process, the BOP would require between \$2.31 and \$2.55 billion in additional appropriations and when completed these facilities would add approximately 9,400 new beds to rated capacity (2013 President's Budget, Federal Prison System, Buildings and Facilities, Exhibits O and P). Over the next two years the BOP projects growth of 11,500 inmates, or approximately 5,700 inmates annually.

The Administration continues to support the two legislative proposals which, if enacted, will moderate the projected population increases. In addi-

tion as indicated in the Budget, the DOJ proposes to amend the compassionate release criteria which will also impact future population projections.

Question. The inmate population in BOP facilities is approximately 39 percent above the rated capacity of those facilities, and the overcrowding rate is scheduled to rise to 42 percent by the end of FY 2013. If additional funding for constructing new BOP prisons is not forthcoming in the next few fiscal years, how would that affect the overcrowding rate by 2018?

Answer. Continuing increases in the inmate population pose an ongoing challenge. BOP estimates the system-wide crowding rate will increase from the current level of 38 percent to 43 percent by the end of FY 2013. Assuming currently budgeted capacity the overcrowding rate is projected to increase to 49 percent by FY 2018.

The Administration continues to support the two legislative proposals which, if enacted, will moderate the projected population increases. In addition as indicated in the Budget, the DOJ proposes to amend the compassionate release criteria which will also impact future population projections.

Question. The budget proposes a rescission of \$75 billion in unobligated, prior-year construction funding. If this funding were not rescinded, would it be approximately sufficient to acquire an existing prison facility? If not, what is the minimum level of additional funding that would be required to purchase and prepare such a facility?

Answer. The funding required to acquire an existing prison facility would depend upon the condition and location of the existing facility, as well as whether it would be operated as a medium or high security facility.

Question. How would BOP use such a facility and how would it impact the rate of overcrowding?

Answer. If BOP acquired an existing facility, it would be of medium or high security capacity to help manage the growing inmate population. Currently, crowding in medium security institutions is projected to reach 63 percent over rated capacity by the end of FY 2013. By acquiring a state facility with a capacity of 1,200 beds, the BOP could reduce the projected rate of crowding in medium security institutions to 51 percent by the end of FY 2013.

Question. How does the cost of buying an existing prison compare to the cost of constructing a new one?

Answer. Depending on the location and condition of the state prison, BOP estimates it could acquire one at about half (or less) of the cost of constructing

a new one. In addition to cost, an existing prison would also be ready to receive inmates more quickly.

OVERCROWDING'S IMPACT BOP OPERATIONS

Question. How is overcrowding impacting BOP operations and, in particular, has there been an increase in serious assaults against correctional workers by inmates, or an increase in serious assaults against inmates by other inmates?

Answer. In 2005, BOP performed a rigorous analysis of the effects of crowding and staffing on inmate rates of violence. Results demonstrated that crowded prisons and reduced staff lead to increases in violence among the inmate population. Crowding also affects inmates' access to important services (such as medical care and food services), an institution's infrastructure (the physical plant and security systems), and inmates' basic necessities (access to toilets, showers, telephones, and recreation equipment). Correctional administrators agree that crowded prisons result in greater tension, frustration, and anger among the inmate population, which leads to conflicts and violence.

BOP has taken a variety of steps, including operational enhancements, to maximize BOP staff's ability to effectively manage overcrowded institutions. Specifically, improvements were made in the architectural design of new facilities, and a variety of security technologies (e.g. enhanced video cameras, improved body alarms, more sophisticated perimeter detection systems) are now available. Both the architectural changes and new technologies have helped staff to monitor and supervise the growing number of inmates.

In addition, BOP has enhanced its population management strategies in a variety of areas, including an improved inmate classification/designation system, more targeted training of staff, intelligence gathering, gang management, controlled movements, preemptive lockdowns, and proactive interventions to prevent violence and other serious misconduct. For example, BOP began operating Special Management Units (SMUs) in FY 2008, targeting inmates who have proven to be violent or confrontational, resistant to authority, and disrespectful to institution rules. Designation to a SMU may be considered when an inmate's behavior poses a threat to the safe and secure operation of BOP facilities.

All of these factors have been helpful; however, BOP's older facilities (about one-third are over 50 years old) are less amenable to some of the technological and architectural improvements (e.g., surveillance cameras) as well as the changes in population management techniques (e.g., "preemptive lockdowns" are not possible in older institutions that have dormitory style housing rather than cells).

The number of serious assaults against correctional workers by inmates has been decreasing from FY 2005 (137 serious assaults) to FY 2011 (52 serious assaults). Serious assaults against inmates by other inmates have dropped slightly. From FY 2005 to FY 2011, serious assaults against inmates fell from 413 to 346.

INTERNATIONAL PRISONER TRANSFER PROGRAM

Question. A December 2011 report from the Department of Justice Office of Inspector General (I-2012-002) made a number of recommendations to BOP to improve its management of the International Prisoner Transfer Program, and estimated that improved management could help BOP realize annual savings ranging from \$10.1 million to \$50.6 million. What is the status of BOP's efforts to address these recommendations?

Answer. The report concluded that educating inmates about the International Prisoner Transfer Program (IPTU) and allowing them the opportunity to transfer to their home countries could have significant savings for BOP incarceration costs. BOP has taken several steps to address the IPTU report recommendations. BOP has requested that the Office of Inspector General (OIG) close the report recommendations. Actions BOP has taken to close these report recommendations include:

- Translating the program statement, "Transfer of Offenders To or From Foreign Countries," into Spanish, French, Portuguese, Italian and German. The translated policies were posted on the BOP's Intranet on January 24, 2012. BOP is attempting to obtain a larger contract to translate the program statement into Dutch, Polish, Korean, Russian, Greek, Swedish, Japanese, Hungarian, Ukrainian, Serbian, Arabic, and Romanian. In addition, BOP notified all Wardens of the available translations.
- Revising the program statement to ensure eligibility criteria are accurately reflected. BOP received comments from the Office of Enforcement Operations, International Prisoner Transfer Unit (IPTU) and met on February 9, 2012 to review the Transfer of Offenders To or From Foreign Countries program statement. BOP revised the program statement to ensure it accurately reflects the eligibility criteria based on the treaty requirements and IPTU's consideration, in addition to any other changes and/or clarifications required. BOP provided IPTU with a draft program statement with the agreed upon revisions by April 2, 2012. Other comments received from the IPTU included accurately reflecting the process by which an inmate can obtain more information from IPTU regarding the reason(s) for transfer denial, the need for a background

statement on the history of treaty agreements in the program statement, a standardized Treaty Transfer Admission and Orientation Lesson Plan, strengthening language with regard to pending appeals, and ineligibility criteria specifically related to Mexican nationals.

- Revising the lesson plan and instructional slideshow for staff involved in completing treaty transfer applications, as well as for staff involved in the initial review of the application and/or reapplication. All appropriate staff completed the training by March 31, 2012.
- Incorporating into the program statement the requirement for supervisory staff to review an inmate's eligibility criteria prior to completing treaty transfer application/reapplication packets. In addition, the Transfer Inquiry form (BP-A0297) has been revised to specify common criteria which would exclude an inmate from participation based on ineligibility.
- Implementing new Program Review Guidelines for Correctional Programs. This was updated on June 3, 2011 to include specific review steps for treaty transfer requests.

QUESTIONS FOR THE RECORD—MR. SERRANO

RESIDENTIAL DRUG ABUSE PROGRAM

Question. My understanding is that English language proficiency is a requirement for participation in the Residential Drug Abuse Program (RDAP)—is this correct? If so, how does the Bureau of Prisons work to ensure that individuals who do not speak English as a primary language can participate in the program?

Answer. For RDAP to be successful, all inmates and staff must interact with each other; therefore, requiring use of a common language. RDAP replicates a community in which all participants are responsible for each other and develops inmates' pro-social skills, intervening in behavioral areas such as: impulse control, criminal lifestyles and relationship building. These program activities all require speaking, understanding, reading and writing in the language in which the program is conducted. While currently RDAP is an English language program, in order to accommodate and benefit more inmates, BOP plans to implement a Spanish language RDAP beginning in FY 2013.

BOP also provides English language proficiency exams and classes in accordance with the mandatory functional literacy requirement, Title 18 U.S.C. §3624(f)(4), which states, "Non-English speaking inmates shall be required to participate in English-as-a-Second Language (ESL) program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test."

Question. To participate in RDAP, a person must generally be within 15 to 18 months of release. However, if an individual is not proficient in English by this point in time, they are unable to participate. Does the Bureau of Prisons coordinate English language proficiency assessments and classes to ensure that individuals have sufficient time to become proficient enough in English in order to qualify for RDAP?

Answer. To participate in the RDAP, an inmate must be within 24–42 months of release. BOP provides English language proficiency assessments and classes in accordance with the mandatory functional literacy requirement, Title 18 U.S.C. §3624(f)(4), which states “Non-English speaking inmates shall be required to participate in English-as-a Second Language (ESL) program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.” Depending upon the language skills of the inmate and the timing of release, an inmate may or may not have sufficient time to become proficient enough in English in order to qualify for RDAP prior to release. However, BOP plans to implement a RDAP in FY 2013 for inmates who speak only Spanish to accommodate more inmates.

WEDNESDAY, AUGUST 1, 2012.

FINAL REPORT OF THE WILLIAM H. WEBSTER COMMISSION ON THE FBI, COUNTERTERRORISM INTELLIGENCE, AND THE EVENTS AT FORT HOOD, TEXAS, ON NOVEMBER 5, 2009

WITNESSES

MARK F. GIULIANO, EXECUTIVE ASSISTANT DIRECTOR, NATIONAL SECURITY BRANCH, FEDERAL BUREAU OF INVESTIGATION

OPENING STATEMENT—MR. WOLF

Mr. WOLF. Good morning. The hearing will come to order.

One, before I read my opening statement, I want to say that I appreciate the work of Judge Webster and those that worked with Judge Webster on the Commission. I also want to thank the men and women of the FBI, who over the years have really done an outstanding job in so many areas. And also the purpose of the hearing is to do what we can to make sure that we prevent this from ever taking place again.

I also am disappointed that Director Mueller cannot be here. I think this would have been an appropriate hearing for him to be here.

Today's hearing is on the Final Report of the William H. Webster Commission on the FBI, Counterterrorism Intelligence, and the Events at Fort Hood, Texas. I want to welcome the witness, Mark Giuliano, the FBI's Executive Assistant Director for National Security. I thank you for your appearance today, and thank you for the service to the country.

On November 5, 2009, United States Army Major Nidal Hasan entered the Fort Hood deployment center carrying two pistols. He shouted, "God is great," in Arabic, and opened fire, killing 13 people—and I think as we go through the whole hearing, we should remember 13 people were killed—and injuring 42 others. Hasan is awaiting military trial for 13 counts of premeditated murder and 32 counts of attempted murder.

The Webster Commission report was issued publicly on July 19th. The report includes extensive factual findings on the FBI's counterterrorism authorities programs and systems, as well as specifics on the FBI investigation of Anwar al-Awlaki and the assessment of Nidal Hasan. The report analyzes the Bureau's actions and includes 18 recommendations for policy, procedural, and other actions.

[CLERK'S NOTE.—The full unclassified version of The Final Report of the William H. Webster Commission on The Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood on November 5, 2009 is included at the end of this hearing transcript.]

After reading the report, I am concerned that there were warning signs, and that with more aggressive investigation there is a chance that this incident could have been prevented. I am further concerned that the reason for less aggressive investigation may have been political sensitivities in the Washington field office, and maybe even in the FBI's own investigating guidelines. An active duty member of the military communicating with a known radicalizer and recruiter should have been taken more seriously than it was. The report shows that the San Diego field office believed that at the time, as is shown by their unusual reactions to how the lead was handled by the Washington field office, so they believed that at that time.

While the Commission found that the decision not to interview Hasan was flawed, I am concerned that the current FBI guidelines and culture made this the path of least resistance. The Webster Commission makes no recommendations on changing the FBI's Domestic Investigations and Operations Guide, the DIOG, but if these guidelines were indeed followed in this case, and that failed to prevent all these deaths and injuries, it may be worthwhile to question whether the guidelines themselves are a problem. We want to understand what took place and ensure that agents are empowered to prevent similar attacks in the future.

I will also have questions based on the report's findings and recommendations on what steps have been taken and will be taken to improve counterterrorism assessments and investigations. Several of these recommendations have resource implications which we will want to consider in terms of fiscal year 2013, so I would urge that after this hearing, in the interim during the month of August, the FBI come up and meet with the staff on both sides to see as we are putting together the so-called CR what the ramifications are and what can and cannot, but I think you should have the staff meet with the staff on both sides as we work on that.

Finally, I am concerned that the FBI may not have provided—and I think this is very important—I am concerned that the FBI may not have provided the Commission with a full accounting of its prior interactions with Awlaki, including the notable omission of Awlaki's return to the U.S. In October 2002 when the FBI dropped an outstanding warrant for his arrest. Imagine if that warrant had not been dropped, and it would not be good if the FBI had not communicated to Judge Webster the full accounting of Awlaki's prior interactions.

Before I recognize you to present your testimony, I would like to recognize my colleague, Ranking Member Mr. Fattah, for any comments he would like to make.

OPENING STATEMENT—MR. FATTAH

Mr. FATTAH. Thank you, and let me thank the chairman for today's hearing. And obviously we have had an opportunity in a classified session to take in this information and a chance to process it, but I think for transparency purposes this hearing is very useful.

I want to say that not only do I thank the chairman for following through on this, I think it is very important that the Congress do appropriate oversight on these issues. However, given the issues

related to Fast and Furious and this, I want to make it clear, at least in my view, that none of our work should be in terms of criticizing law enforcement.

Federal law enforcement officials are doing an extraordinary job under very difficult circumstances, and it is very easy for us to go back and look at these things, and we should, to see how we can create better policies going forward. But to take people who are risking their lives on behalf of the country and raking them over the coals I don't think is the right way to go. And I know the chairman, whose father was a policeman, has a great appreciation for law enforcement.

I think that the issues here in terms of what we ought to do going forward are well represented in the 18 recommendations that the Commission has laid out. But as we did in looking at the McVeigh case with the Oklahoma City bombing, or as will be done with the situation in Denver, when there are these horrific instances, we have to take a look, and we have to make sure that we are doing everything we can do. But there is very little ability to figure out exactly what an individual was actually up to in all circumstances.

So, I thank the Webster Commission for doing the work that it has done. I think the chairman is correct to say that we need to look at how we prioritize leads and this question of discretionary leads, and I know that you will have some discussion about the fact that that policy has now been changed.

But I want to welcome you to the hearing, and I want to thank the Bureau for the work that it does each and every day to protect the United States of America and its citizens and the great work you have done since 9/11 to change the agency's focus to terrorism, first, second, and third, which is a different type of work because you are trying to prevent instances versus catch the bad guy. So thank you, welcome, and I look forward to your testimony.

Mr. WOLF. With that, you may proceed. Thank you, Mr. Fattah.

OPENING STATEMENT—MR. GIULIANO

Mr. GIULIANO. Thank you, sir. Good morning, Chairman Wolf, Ranking Member Fattah, and members of the Committee. Thank you for the opportunity to appear before you today.

Following the tragic events of Fort Hood in November of 2009, the FBI Director ordered an immediate internal review of what the FBI knew about Major Nidal Hasan prior to the shootings. Within days, the FBI had identified several shortcomings in our internal policies, procedures, and in our training, and we started to take corrective action almost immediately.

The Director also recognized a need for a broader, more in-depth, and independent review on how the FBI handled and acted on counterterrorism intelligence before the Fort Hood shootings. The Director asked former Director, Judge William Webster, to form a commission to conduct that review. Several weeks ago, as you know, and as has been stated, Judge Webster completed the Commission's report, and that report has been made available to Congress and to the public.

The Webster Commission had full access to FBI holdings, they conducted more than 100 formal and informal interviews, meetings

and briefings, and they reviewed more than 10,000 FBI documents. The Commission also consulted with outside experts on counterterrorism, intelligence operations, information technology, and violent extremism. The Commission found a number of shortcomings in FBI policies, technology, and training, and made 18 recommendations for corrective action.

As you know, there are limits to what can be discussed today in an open hearing, and Nidal Hasan is also the subject, as was mentioned, of an ongoing criminal prosecution, and many aspects of the information related to this matter remain classified. As was noted, we did provide a full classified briefing, and we will answer as many questions as we can in this open setting.

Next, let me summarize the Commission's findings and recommendations and review the corrective actions taken by the FBI already. The Committee's recommendations fall generally into four distinct categories. One was information sharing; two, operational policies, as was noted; information technology; and training. And I will discuss very shortly each one.

Starting with information sharing, the Commission found that more information could have and should have been shared with the military at the headquarters level; that is, from the FBI headquarters to the Pentagon. Our internal review came to the same conclusion, and within weeks, the FBI and the Department of Defense created new information-sharing agreements regarding counterterrorism investigations of military personnel. This agreement made sure that senior Pentagon officials as well as Department of Defense task force officers on JTTFs around the country were aware of all FBI cases involving the military. The FBI continues to work closely with the military on these matters, and we have clear policies in place to make sure that information sharing continues.

Turning to operational policy. The Commission recommended that there be clearer policies covering all counterterrorism leads and for resolving disputes as it relates to those leads. We will get into that a little more as questions arise. The FBI's internal review found similar issues with our policies. As a result, the FBI has set new time limits on covering leads, reinforced our existing policies on who owns the leads and the responsibility for every one of those leads, and provided additional guidance to make clear that any disputes between JTTF members must be pushed up to the supervisor level both within the field office and at headquarters.

Lastly, the FBI has provided enhanced analytical investigative resources for strategically significant investigations to make sure all proper steps are taken and there is additional oversight.

In the area of information technology, the Commission found that improved software and search capabilities in our classified databases could have assisted the investigators on both JTTFs, the one in San Diego and the one in the Washington field office. Within months of the shootings, the FBI developed new software improvements to connect intelligence information automatically, more effectively and more efficiently. With new programs like DIVS and Sentinel, which is now up and running, the FBI is also providing greater search capabilities across all holdings.

The Commission also made recommendations to improve training for all Joint Terrorism Task Force officers related to the intelligence bases. Within months of the shooting, the FBI had completed this training for all task force officers in every JTTF, and we have since instituted a nine-day mandatory training course for all JTTF participants.

There are additional detailed recommendations not in these categories, and we have publicly responded to each on our website.

As you know and as was stated, on a daily basis the FBI and its partners on JTTFs across the U.S., and indeed across the globe, must identify, respond to, and mitigate countless terrorism threats. We do this in an ever-changing and a complex environment. In recent years we have been able to successfully disrupt dozens of terrorist plots. We also know that the threat never wanes, and we cannot overlook a single lead. At the FBI we accept this responsibility every day, and we are committed to improving our capabilities to protect this great Nation now and in the future.

And with that, I will answer to your questions, sir.

Mr. WOLF. Thank you very much.

[The information follows:]



Department of Justice

STATEMENT OF

**MARK F. GIULIANO
EXECUTIVE ASSISTANT DIRECTOR
NATIONAL SECURITY BRANCH
FEDERAL BUREAU OF INVESTIGATION**

BEFORE THE

**SUBCOMMITTEE ON COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES
COMMITTEE ON APPROPRIATIONS
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**THE REPORT OF THE WILLIAM WEBSTER COMMISSION ON THE FBI,
COUNTERTERRORISM INTELLIGENCE AND THE EVENTS AT FORT HOOD, TEXAS
ON NOVEMBER 5, 2009**

PRESENTED

AUGUST 1, 2012

**STATEMENT OF
MARK F. GIULIANO
EXECUTIVE ASSISTANT DIRECTOR
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THE REPORT OF THE WILLIAM WEBSTER COMMISSION ON THE FBI,
COUNTERTERRORISM INTELLIGENCE AND THE EVENTS AT FORT HOOD, TEXAS ON
NOVEMBER 5, 2009**

AUGUST 1, 2012

Good morning Chairman Wolf, Ranking Member Fattah, and members of the subcommittee.

Judge William H. Webster has delivered to the FBI the *Final Report of the William H. Webster Commission on The Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events of Ft. Hood on November 5, 2009*.

The FBI requested a full investigation of the manner in which the FBI and its Joint Terrorism Task Forces handled and acted on counterterrorism intelligence before and after the Fort Hood shootings, as well as a review and assessment of the FBI's governing authorities and the FBI's remedial measures after the Fort Hood shootings. The investigation did not probe the shootings, which are the subject of a U.S. Army-led inquiry and military criminal proceeding against Major Nidal Hasan. The FBI and Department of Justice provided the Commission with more than 100 formal and informal interviews, meetings, and briefings, and more than 10,000 pages of documents. The Commission also consulted with outside experts on counterterrorism and intelligence operations, information technology, and violent extremism; public interest groups; and staff from Congressional committees with responsibility for oversight of the FBI.

The Commission found shortcomings in FBI policy guidance, technology, information review protocols, and training, and made 18 important recommendations for corrective and enhancing measures in those areas. The FBI concurs with the principles underlying all the recommendations and has already taken action to implement them, based on a combination of the Commission's work, the FBI's own internal review of the Fort Hood shootings, and the report of the U.S. Senate Committee on Homeland Security and Governmental Affairs.

The Commission also found that, working in the context of the FBI's pre-Fort Hood authorities, policies, operational capabilities, and technology, personnel who handled counterintelligence information made mistakes. The Final Report concludes, however: "We do not find, and do not suggest, that these mistakes resulted from

intentional misconduct or the disregard of duties. Indeed, we find that each Special Agent, Intelligence Analyst, and Task Force Officer who handled the [intelligence] information acted with good intent.”

Judge Webster appointed five seasoned investigators and legal specialists from the private sector to serve as Commissioners. “Their contributions of time and energy were substantial and an act of selfless patriotism,” Judge Webster said. The Final Report contains the names and biographies of Commission members.

Below you will find the FBI’s response to each of the Webster Commission’s 18 recommendations.

I look forward to answering any questions you might have.

**FBI Response to
The Final Report of the Judge William H. Webster Commission on
The Federal Bureau of Investigation, Counterterrorism Intelligence, and
The Events at Fort Hood, Texas, on November 5, 2009**

The Webster Commission makes 18 recommendations for corrective and enhancing measures regarding FBI policy and operations, information technology, and training. The FBI concurs with the principles underlying all the recommendations and has already taken action to implement them, based on the Commission's work, the FBI's own internal review of the Fort Hood shootings, and the report of the U.S. Senate Committee on Homeland Security and Governmental Affairs.

Policies: The Webster Commission recommended that the FBI promulgate formal written policies related to the command-and-control of counterterrorism operations between FBI Headquarters and its field offices, the responsibility for investigative leads set from one field office to another, the resolution of inter-office disputes, and assignment and completion of leads. Most of these recommendations focus on the formalization of existing and longstanding FBI practices and procedures. The FBI recognizes the value of written policy and agrees with the recommendations. The FBI also expects its Agents, Analysts and other personnel to use sound judgment in conducting thorough investigations, and to take responsibility for bringing issues to resolution. The organizational structure of the FBI also achieves in large part the objectives of the recommended written policies.

Webster Commission Recommendation on Counterterrorism Command-and Control Hierarchy

- The FBI has undergone many changes since September 11 to prevent terrorist attacks, and key among those changes was centralizing command-and-control of counterterrorism operations in the Counterterrorism Division (CTD) at FBI Headquarters. The CTD Assistant Director provides direction for all counterterrorism matters, including counterterrorism operations.
- The FBI has issued guidance to all offices on national management and oversight of counterterrorism matters that identifies CTD entities with responsibility for specific counterterrorism mission areas.

Webster Commission Recommendation on Ownership of Counterterrorism Leads

- As noted by the Commission, FBI practice has long been that offices assigned counterterrorism leads have ultimate responsibility for their timely and diligent completion.
- The FBI has issued formal written policy that requires offices to complete all leads within specific timeframes. The office assigned the lead is responsible for its resolution.
- In addition, more than two years ago, the FBI simplified lead categories. The FBI eliminated "Discretionary Leads," such that leads may only be "information only" or action leads.

Webster Commission Recommendation on Interoffice Disagreements in the Counterterrorism Context

- The FBI has issued guidance on the resolution of inter-office disagreements.
- Offices must work to resolve disagreements through the chain-of-command. As necessary, the Assistant Director in charge of the Counterterrorism Division is the official responsible for final decisions.

Webster Commission Recommendation on Completion of Routine Counterterrorism Leads

- The FBI has issued formal written policy that requires offices to complete all leads within specific timeframes.

Webster Commission Recommendation on Leads for Joint Terrorism Task Force (JTTF) Task Force Officers

- The FBI agrees that there may be situations in which the assignment of a JTTF Task Force Officer as lead investigator may not be in the best interest of the investigation.
- The FBI also recognizes and values the unique contributions of its Task Force Officers, including their specialized knowledge and familiarity with their home agency's systems and procedures, and will assess the proper assignment for each investigation based on the circumstances of each case.

Webster Commission Recommendations on Counterterrorism Assessments of Law Enforcement and Other Government Personnel

- As the Commission notes, the FBI implemented, within weeks of the Fort Hood attacks, an information-sharing agreement with the Department of Defense regarding counterterrorism investigations of military personnel. The Webster Commission described this information-sharing agreement as important, noting that it "assures that, as a matter of written policy, the FBI will provide timely and consistent notice of counterterrorism assessments and investigations" of Defense Department personnel.
- Consistent with the Commission's recommendation, the FBI is pursuing similar arrangements regarding other Federal, State, and local government employees.

Integrating Intelligence and Operations: The Webster Commission reported that it was impressed with the quality and commitment of the FBI's Intelligence Analysts and the integration of Analysts into the FBI's work.

Webster Commission Recommendation on Continued Integration of Intelligence Analysts into Operations

- As the Report recognized, the FBI has already taken significant steps to strengthen its integration of intelligence and operations.

- The Counterterrorism Division has created a strategic analytical and operational branch that includes multiple threat-based fusion cells, responsible for ensuring counterterrorism operations and collection are focused on priority threats. The Deputy Assistant Director who leads this branch is an Intelligence Analyst.
- The FBI continues to examine innovative ways to integrate intelligence and operations throughout the organization.

Information Technology: The Commission recommended that the FBI employ various enterprise data management and data integration applications designed to aid the FBI in reviewing, analyzing, managing, and acting on information and implement protocols for reviewing such information. In many cases, the FBI has already addressed the Commission's recommendations, including by implementing data management and integration projects and policies designed to help Agents, Analysts, Task Force Officers, and other personnel more effectively review, evaluate, and exploit information. Due in part to the rapidly evolving nature of information technology, and the FBI's numerous initiatives to upgrade its technology, much of the technology and tools in place at the time of the attack, and reviewed by the Webster Commission, have been replaced with more advanced technology over the span of a year or more. The Webster Commission acknowledges that many of these crucial technologies would require additional funding.

Webster Commission Recommendation on Expediting Enterprise Data Management

- The FBI – like the rest of the U.S. Intelligence Community – has focused Enterprise Data Management projects on eliminating “stove-piped” database architecture in order to move toward our goal of collecting and storing data as a service.

Webster Commission Recommendation on Expanding and Enhancing the Data Integration and Visualization System

- Data Integration and Visualization System (DIVS) is one important step in the FBI's broader Enterprise Data Aggregation Plan. DIVS evolves as technology improves and as new data is received. Today's DIVS is beginning to use technology that existed only in concept at the time of the Fort Hood shootings.
- DIVS enables FBI personnel today to use a single log-on and user interface to conduct complex searches across the FBI's most critical data holdings, triage and visualize the results, and integrate the data into analytical tools – all capabilities that did not exist at the time of the Fort Hood shootings. Since the Commission's initial review of DIVS, the number of FBI and non-FBI data sets accessible to DIVS has grown considerably.
- The FBI is working to implement a majority of DIVS' planned analytical capabilities by this Fall. As the technology industry continues to develop electronic means to extract and understand concepts from data, the FBI must focus on and invest in these technologies.

Webster Commission Recommendation on DWS-EDMS

- In 2009, the FBI initiated a multi-phased modernization effort to enhance the Data Warehouse System/Electronic-Surveillance Data Management System (DWS-EDMS). The FBI has adopted a new and more effective search engine for DWS-EDMS.
- The FBI has already invested in hardware necessary for a technical refresh and to enable a disaster recovery capability for DWS-EDMS. As stated in the report, further investment would be necessary to implement an automated live recovery capability.

Webster Commission Recommendation on Acquisition of Advanced Information Search, Filtering, Retrieval, and Management Technologies

- The FBI has begun implementing an enterprise knowledge-management application that will provide advanced search and analytic tools to review and manage a wide variety of data. Among other things, these tools will help FBI personnel organize intelligence and discover non-obvious connections.
- The FBI is also deploying the next generation of tools to process content within DWS-EDMS; these tools will enable advanced search and other capabilities.
- As the technology industry continues to develop electronic means to extract and understand concepts from data, the FBI must focus on and invest in these technologies.

Webster Commission Recommendation on Review Protocols for Large Strategic Collections of Data

- The FBI is in the process of finalizing protocols to manage the review of large strategic collections of data.

Governing Authorities: The Webster Commission conducted a broad review of the FBI's governing authorities and procedures as they relate to counterterrorism operations. The Commission reports these authorities and procedures strike an appropriate balance between detecting and disrupting threats and respecting civil rights and civil liberties. The Commission also made recommendations regarding the need for the FBI Office of Integrity and Compliance and Inspection Division to conduct internal compliance reviews and audits to ensure compliance with all policies and procedures that protect civil liberties and individual privacy. The FBI supports these recommendations and has taken action to implement them.

Webster Commission Recommendation on Compliance Reviews and Audits

- The FBI regularly conducts reviews to ensure FBI compliance with its policies and procedures and will conduct the reviews and audits identified by the Commission.

Webster Commission Recommendation on Adherence to Information Security Policies

- The FBI regularly conducts reviews to ensure FBI compliance with its policies and procedures and will conduct the reviews identified by the Commission.

Webster Commission Recommendation for FBI Authorities to Remain in Effect

- The FBI agrees that FBI's authorities for National Security Letters, FISA Section 215 Business Records, Roving Wiretaps, and FISA "Lone Wolf" orders are essential tools for protecting national security and should remain in effect.

Webster Commission Recommendation on Updating Attorney General Guidelines Affecting Extra-Territorial Operations

- Since 2011, the FBI and Department of Justice have been engaged in a joint-effort to update the Attorney General Guidelines.

Training: Following the shootings, the FBI immediately instituted additional training for all Task Force Officers related to FBI databases and Joint Terrorism Task Force operations. The Webster Commission concluded that the "FBI's post-Fort Hood enhancements of counterterrorism and JTTF training represent significant improvements."

Webster Commission Recommendation on Training Task Force Officers

- The FBI has substantially expanded its Task Force Officer training, to include the following: a mandatory nine-day orientation course, mandatory FBI database training, and mandatory introductory training prior to a Task Force Officer receiving his or her first duty assignment.
- All mandatory courses must be completed within the first 90 days of assignment to the Joint Terrorism Task Force.

Administrative and Disciplinary Action: At the request of the FBI, the Commission considered whether any administrative or disciplinary action should be taken against any FBI personnel. The Commission determined that it would not recommend any such action against FBI personnel.

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Mr. WOLF. I see Judge Carter, Congressman Carter, came in. He is a member of the full committee, but not the subcommittee. I ask unanimous consent that he be able to sit since Fort Hood was in his district. Without any objection.

Mr. CARTER. Thank you, Mr. Chairman.

ARREST WARRANT FOR AWLAKI

Mr. WOLF. The first question, the reason that Hasan first comes to anyone's attention is his initiation of contact with Anwar al-Awlaki. It becomes very important, then, to understand who the FBI thought Awlaki to be and to understand what the government knew about him at the time.

According to the report, Awlaki was under full investigation by the Washington field office, WFO, starting around 2001. While the report mentions Awlaki moved to England in spring of 2002, it does not mention his return to the U.S. in October 2002, where the outstanding warrant for his arrest was inexplicably withdrawn by the Washington field office.

Why was this return to the U.S. not referenced in the report, and why was the warrant withdrawn if Awlaki was under full investigation by WFO at the time?

Mr. GIULIANO. That is a good question, sir. Two issues of clarification. So Awlaki did return in 2002. There was a Diplomatic Security Service (DSS) warrant out for him. We knew Awlaki was coming back. We had information that he was coming back, and the Colorado U.S. Attorney's office looked at the warrant, looked at the factual basis for the warrant. It was not an FBI warrant, and it was dismissed simply because they did not feel they had the ability to prosecute Awlaki for the alleged passport fraud.

It was not an FBI warrant. Certainly if we felt that warrant was good, and there was a way we could have incarcerated Anwar al-Awlaki at the time, we would have done that, but that was a Diplomatic Security Service, a State Department warrant. As is a normal course, the U.S. Attorney's Office will look at a warrant, especially when somebody is coming back into the country, to see if process can be served, and they determined there was not enough evidence to prosecute him on the passport fraud case there.

Mr. WOLF. It was very unusual, though, and at the time it was early in the morning, and there is more there than I think is obvious. But why was the return to the U.S. not referenced in the report? Did Judge Webster know, was he told of Awlaki's return?

Mr. GIULIANO. Yes, sir. The Commission had full access to all of Awlaki's information. I don't know why it was not referenced other than the fact that it was not an FBI warrant, and we did not ask for it to be dismissed.

Mr. WOLF. So you are confident that Judge Webster knew of Awlaki's return, and the FBI told him of that return?

Mr. GIULIANO. I am confident he had all the documentation on Awlaki that would have referenced this.

Mr. WOLF. Okay. If Awlaki was under full investigation from approximately 2001 to 2003, why was Awlaki approved by DOD security to speak at the Pentagon?

Mr. GIULIANO. Sir, I can't speak for DOD. I can't answer that question.

RELATION BETWEEN AWLAKI AND 9/11 HIJACKERS

Mr. WOLF. What was the FBI's understanding of the relationship between Awlaki and the 9/11 hijackers in January of 2009?

Mr. GIULIANO. Again, sir, great question. I think, as you know, after 9/11, Awlaki came up both in the Commission report, and there were allegations that Awlaki had supported some of the 9/11 hijackers. Extensive investigation was done by the Bureau and the rest of the Intelligence Community to try to determine whether Awlaki had anything to do with 9/11.

As you know, Awlaki early on was the imam of a mosque in San Diego, where two of the 9/11 hijackers went, and then subsequently transferred from there to a mosque in Falls Church, Virginia, where, again, two of the 9/11 hijackers went. We interviewed Awlaki after 9/11 on three separate occasions. He identified one of the 9/11 hijackers as somebody he knew as going to his mosque. We were never able to obtain a stitch of evidence that showed Awlaki knew beforehand about 9/11 or supported the 9/11 hijackers.

Mr. WOLF. Based on history, do you think that is still accurate?

Mr. GIULIANO. I do, sir.

Mr. WOLF. Did Awlaki ever meet with Major Hasan in Virginia?

Mr. GIULIANO. No, not that we know, sir.

Mr. WOLF. Did Awlaki meet with the 9/11 hijackers in San Diego?

Mr. GIULIANO. Let me step back. Awlaki was the imam of a mosque in San Diego where we know two of the 9/11 hijackers went. When we questioned Awlaki, he admitted that one of the 9/11 hijackers went to his mosque. He knew him tangentially, identified him, and gave us a description of his activities, but we were never able to substantiate any of the information that stated Awlaki supported, in any way, shape or form, the 9/11 hijackers.

Mr. WOLF. Right in here it says, Awlaki connected to 9/11, meeting with hijackers, and a report comes in, and the connection of anybody in communication with them, I think, would have been a loud gong. It would have said something is wrong here.

HASAN'S MOTIVES FOR ATTACK

The Senate Homeland Security Committee issued a report on the Fort Hood incident. Senators Lieberman and Collins issued a statement praising the Webster report; however, they also stated that, "We are concerned that the report fails to address the specific cause for the Fort Hood attack, which is violent Islamist extremism."

Do you agree that violent Islamist extremism was the specific, or was a cause of the Fort Hood attack?

Mr. GIULIANO. Sir, I can't say specifically what was in Mr. Hasan's—

Mr. WOLF. What is your gut? Do you believe Awlaki played any role at all?

Mr. GIULIANO. He is getting ready to go to trial, sir. I can't comment on what role and what was in his mind when he made that determination. Clearly Anwar al-Awlaki was an individual who was well known in the community. He was a propagandist at that

point back in that time. We know from some of the emails that Hasan looked at him, in his own words, as a leader and an activist, but I can't get into Mr. Hasan's head.

FBI CHANGES SINCE FT. HOOD ATTACK

Mr. WOLF. Have there been specific changes in the way the FBI approaches and responds particularly to domestic violent Islamist extremists' threats that have arisen based on the lessons learned from Fort Hood?

Mr. GIULIANO. Yes, sir, there has been a number of changes made, starting with radicalization, and this comes out of the Senate Committee report. We have at the various lowest levels, to include our new agents, added classes on radicalization, so at the earliest stages, our agents are looking for and know the tentacles to radicalization and from radicalization to mobilization. It is in all our basic courses for our Joint Terrorism Task Forces, and in our advanced courses there is more training on radicalization.

From the standpoint of understanding an individual like Awlaki, one of the things the report has kind of hulled out and threaded out is that when somebody is moving from maybe a propagandist to at some point being operational, where we saw Awlaki go later, there needs to be not just field office eyes on what we are recovering, like the emails, there also needs to be an additional look from the headquarters level, maybe even from the community, and from some of the interagencies, so that we make sure there is a fuller picture of someone like Awlaki and those that have come in contact with him.

FBI ASSESSMENT OF AWLAKI

Mr. WOLF. There seems to be a significantly different view of Hasan's relationship with Awlaki between the San Diego and the Washington field office. What was the FBI's assessment of Awlaki as of December 17, 2008, and when Hasan contacted Awlaki through his website?

Mr. GIULIANO. Again, sir, it is a good question, and it is an interesting question. As you know, we looked at Awlaki for a number of years, and in that timeframe in 2006, 2007, Awlaki is incarcerated in Yemen, so we actually interviewed him while he was in jail. As he gets out at the end of 2007, beginning of 2008, he comes on line again very quickly with his website and walks a very careful line, I think, between what he puts on his website and his emails. The interagency, the Intelligence Community begins to look at Awlaki, relook at Awlaki, to determine whether he has become operational. We don't see that at that point.

So in that snapshot of time, 2008, early 2009, we are just looking at him. He appears to be a propagandist. There is information that he is starting to get involved with individuals who are related to AQ, but our understanding at that time is that he is an individual who was born in the U.S., spent time in Yemen, and was educated in the U.S. For many people, he was considered an individual who they went to for advice on his website, but we also know he was becoming more radical at that time. So in that snapshot of time, that is kind of the look that we had.

Mr. WOLF. How many people were radicalized by him? Was Chesser radicalized by him? Who were some of the people that we know about who were radicalized by Awlaki?

Mr. GIULIANO. There are a number of other investigations that we have had and have where we know that they are listening to Awlaki sermons online. Again, I don't think we can say that that is the one node that radicalized him. Without a doubt he was part of that radicalization process on individuals like Chesser and others.

Mr. WOLF. Did Chesser ever attribute that he was radicalized because of Awlaki?

Mr. GIULIANO. I can't recall that, but I know he looked at Awlaki.

Mr. WOLF. And how many others fit in the category of Chesser?

Mr. GIULIANO. There are a number of others, I don't know the exact numbers.

Mr. WOLF. Would you submit them for the record at this point who you believe were part like Chesser that were radicalized?

Mr. GIULIANO. I can go back and look at our disruptions and those that were touched by Awlaki, yes, sir, I can.

[The information follows:]

RADICALIZATIONS DUE TO AWLAKI

The number of radicalizations is classified and will be provided separately in a classified setting.

Mr. WOLF. And did prior investigations or the relationship with Awlaki shape the FBI's understanding or misunderstanding of the threat he posed?

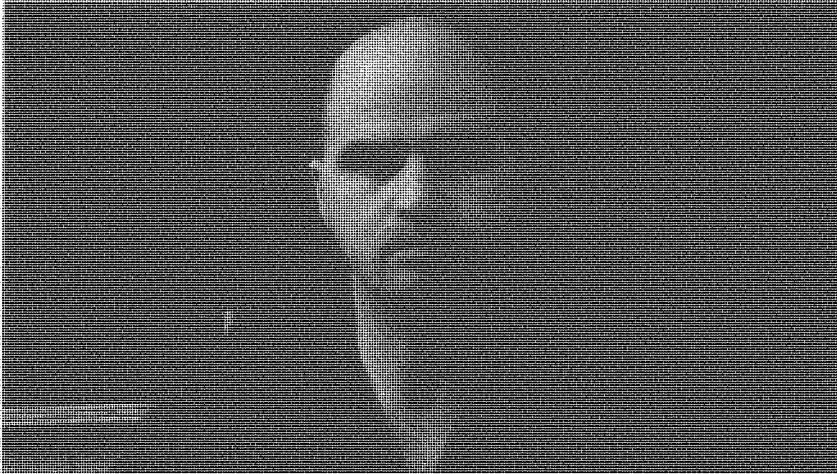
Mr. GIULIANO. Sir, I think that if you look at—and you referenced it—the lead that came out of San Diego, they felt that they had, and I feel that they had, an accurate reflection of what Awlaki was at that snapshot in time.

Mr. WOLF. How many other U.S. Government or military employees were found to have contacted Awlaki during this period? Have these individuals now been fully investigated, and did any hold security clearances, as Hasan did? And I would like to share with you, and if the staff would share with the members of the committee, an NPR story last month that indicated that the FBI has conducted more than 100 investigations into suspected Islamic extremists within the U.S. military. How would you assess that threat? And tell us what you are doing about it. Is that accurate, the NPR report?

[The information follows:]

FBI Tracking 100 Suspected Extremists In Military

by DINA TEMPLE-RASTON



Enlarge

Handout/Getty Images

The FBI is investigating more than 100 suspected Muslim extremists who are part of the U.S. military community, officials tell NPR. U.S. authorities have increased scrutiny since the 2009 shooting attack at Fort Hood, Texas, that left 13 dead. Maj. Nidal Hasan, charged with the killings, is shown here in an April 2010 court hearing.

June 25, 2012

The FBI has conducted more than 100 investigations into suspected Islamic extremists within the military, NPR has learned. About a dozen of those cases are considered serious.

Officials define that as a case requiring a formal investigation to gather information against suspects who appear to have demonstrated a strong intent to attack military targets. This is the first time the figures have been publicly disclosed.

The FBI and Department of Defense call these cases "insider threats." They include not just active and reserve military personnel but also individuals who have access to military facilities such as contractors and close family members with dependent ID cards.

Officials would not provide details about the cases and the FBI would not confirm the numbers, but they did say that cases seen as serious could include, among others things, suspects who seem to be planning an attack or were in touch with "dangerous individuals" who were goading them to attack.

I was surprised and struck by the numbers, they were larger than I expected.

Details Revealed At Closed Congressional Hearing

The FBI and the Department of Defense declined to discuss the figures on the record, but three sources with

- Sen. Joseph Lieberman, who co-chaired a hearing on internal

direct knowledge confirmed that the numbers were revealed in a closed session of a House-Senate committee hearing in December. The FBI also declined to say whether it has compiled more up-to-date figures since that time.

threats to the military

"I was surprised and struck by the numbers; they were larger than I expected," Sen. Joseph Lieberman, an independent from Connecticut and chairman of the Senate Committee on Homeland Security, told NPR. He stopped short of confirming the numbers.

The Oft-Delayed Trial Of Maj. Nidal Hasan

Maj. Nidal Hasan, the man charged in the 2009 Fort Hood shootings, has had his trial postponed several times already. At a pretrial hearing last Tuesday, a military judge kicked him out of the courtroom and barred him from future hearings as long as he keeps his beard, which violates military regulations.

Hasan, who was warned about his beard previously, was taken to a nearby room to watch the proceedings on a closed-circuit television.

His trial is now set for Aug. 20, and prosecutors are seeking the death penalty for the shooting rampage that left 13 dead and more than 30 injured at the Texas military base.

Hasan was shot by police that day. He is paralyzed from the waist down and uses a wheelchair. He remains jailed, though he still draws his military pay for now.

— Greg Myre

"I know one can say that as a percentage of the millions of people in active military service or working with contractors, the numbers you talk about are a small percentage of the total, but the reality is it only took one man, Nidal Hasan, to kill 13 people at Fort Hood and injure a lot more," Lieberman said.

Hasan was an Army major at Fort Hood in Texas who is charged with opening fire on soldiers in the base's processing center in November 2009. The rampage is considered the most serious terrorist attack on U.S. soil since the Sept. 11 attacks.

Prosecutors say Hasan had been in touch with an American-born radical imam, Anwar al-Awlaki, to ask for spiritual guidance ahead of the shooting; and Awlaki is said to have blessed it. Awlaki was killed in a drone attack in Yemen last year.

Investigators also say Hasan had been displaying signs of increasing radicalization before the shooting took place, but the behavior had not been properly reported. Hasan's court-martial is

set to begin on Aug. 20, and he faces the death penalty.

The FBI compiled its tally of Islamic extremist cases in the military late last year for a joint hearing that Lieberman co-chaired. The hearing was looking at possible threats to military communities inside the United States, and the number of cases was revealed at that time.

About A Dozen Cases Face Full Investigation

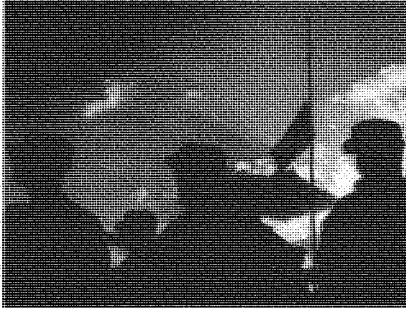
The FBI typically divides investigations into three categories: assessment, preliminary investigations, and then full investigations in which agents have enough evidence to justify using all the investigative tools at their disposal. As of last December, there were a dozen cases in that last category.

"This number speaks not only to the reality that there is a problem of violent Islamic extremists in the military, but also that the Department of Defense and the FBI since the Nidal Hassan case are working much more closely together," said Lieberman.

Officials stressed that the FBI and the Department of Defense track all kinds of extremism within the

military community from white supremacists to neo-Nazis, not just Islamic extremists.

But the Fort Hood shooting inspired new reporting procedures aimed at catching plots before they unfold. Since 2001, law enforcement officials have foiled and prosecuted more than 30 plots or attacks against military targets within the United States.



Enlarge

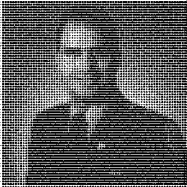
Joe Raedle/Getty Images

U.S. Army soldiers attend a Nov. 10, 2010, service for the 13 people killed in the shooting rampage five days earlier at Fort Hood.

guilty of conspiring to attack a restaurant just outside Fort Hood where active service members often went with their families. Abdo is expected to be sentenced in July. It is not clear whether his case was one of the cases on the FBI's list.

Military Bases Considered Likely Targets

Officials say for many aspiring violent jihadis a military base is seen as fair game for an attack. Al-Qaida's narrative revolves around the idea that America is at war with Islam the world over, and the perception is that the U.S. military is at the forefront of that battle.



the two-way

**Senate Report:
Authorities Could
Have Prevented
Fort Hood
Shootings**

Counterterrorism officials say that for many freshly minted jihadis, a military target is an easier choice and easier to justify than targeting a shopping mall or other soft civilian targets — precisely because it is seen as part and parcel of the battle.

"After the Fort Hood shooting, having just one serious case, much less having a dozen, is cause for concern," says Bruce Hoffman, a professor and counterterrorism expert at Georgetown University and a distinguished scholar at the Wilson Center.

"You have to think about how people in the military community aren't just your run-of-the-mill jihadis," Hoffman says. "These are people who have access to guns and to bases and are supposed to have security clearances. This is not the community you want to be radicalizing."

A Conviction Last Month

Just last month, an AWOL Muslim soldier named Naser Abdo was convicted of plotting to attack Fort Hood. Officers found components for an explosive device in Abdo's hotel room not far from the base.

Abdo told the judge that the plot was supposed to exact some "justice" for the people of Afghanistan and Iraq. In an audio recording played during the trial, Abdo said his Islamic faith was part of the reason he planned the attack.

Lieberman says that Abdo actually called out Major Hasan's name shortly after he was found

Mr. GIULIANO. Sir, the exact number is classified, so I can't talk about it in this setting. I can in another setting.

Mr. WOLF. Okay. You can tell us that. We can do that.

Mr. GIULIANO. I will. It is something that we look at very, very carefully. There are many investigations that we are running jointly with the Department of Defense right now.

To get to your point, we believe we know who has been in contact with Awlaki, or at least potentially is listening or has listened to Awlaki sermons, etc. and I believe we do have them well covered, under investigation.

Mr. WOLF. If you would tell us, we could get that from you.

Mr. GIULIANO. Yes, sir.

[The information follows:]

NUMBER OF INVESTIGATIONS OF U.S. MILITARY PERSONNEL

The number of military personnel being investigated for possible radicalization is classified and will be provided separately in a classified setting.

CONTACTS BETWEEN HASAN AND AWLAKI

Mr. WOLF. The emails shown in the report between Hasan and Awlaki are troubling. In his very first email to Awlaki, Hasan raises the question of religious justification for Muslims in the U.S. Armed Forces killing other U.S. soldiers. He praises Awlaki's religious understanding and asks him for a reply.

It is hard for me to understand the context in which such an exchange was found to be benign without any significant assessment or investigation. Does that seem unusual to you?

Mr. GIULIANO. Sir, I think, as you know, there are a couple of issues here, and it is where the Commission found that we certainly fell short. Of the two emails, that is the one where Hasan is asking Awlaki to make some general comments about Muslims in the military. I cite that from his first email; and then the second email, which was pushed forward by San Diego as a lead to the Washington field office which says, while the emails may seem somewhat inane, if he is in the military, that is something that should concern you. That is the way the lead was forwarded.

A couple of things occurred. There were additional emails that the Washington field office agent was not privy to, and when he looked at these two emails, he did a couple of things, I think rightfully and right up front. He went to his DOD counterpart. So the task force agent in the Washington field office is from the Department of Defense. He pulls and does database searches on Hasan, on his email, on his phone numbers, to see if he is tied into any other terrorist group or somebody that we have under investigation, but then he goes to DOD and asks them to provide him their reports on Hasan. He goes to his online files, the Defense Manpower Data Center via email, and retrieves 30 files from DOD. He also retrieves his Defense Employee Interactive Data, or DEIDS, System information and retrieved about five or six of Hasan's recent performance appraisals.

So the Agent does the checks and finds nothing else unusual about Hasan. He finds out he is active duty military and that within that month, within May, had been promoted from captain to major.

The other thing that he found unusual is that Hasan held a secret security clearance, and at the time was getting his master's degree, his MPH, specifically talking about what it was like to be a Muslim in the military and the conflict that occurred there. The Department of Defense record lauds him for his research there, saying that it is cutting edge, and that it is looked at by his peers as cutting-edge research.

So from his standpoint, where he sits in that time, he is looking at an individual who holds a secret security clearance; who has recently been promoted from captain to major; who was not trying to hide his identification in any way, shape or form from Awlaki. In fact Hasan goes to his website, so the contact is actually through Awlaki's website, not a personal, person-to-person email address, and the task force officer believes where he is sitting that it is in line with the research Hasan is doing. All Hasan's performance appraisals are positive. They state that he should be promoted, and the task force officer does not want to take a chance to move forward at that time and potentially risk the fact that Awlaki is under investigation.

So, again, a snapshot in time. Easy to go back and second-guess that DOD task force officer, and, again, I am not making excuses, I am trying to put it into the context of what he had available to him at the time when he made that decision.

Mr. WOLF. I have a few more questions, and then we are going to go to Mr. Fattah.

DOMESTIC INVESTIGATIONS AND OPERATION GUIDE

Did the FBI personnel involved in the Hasan assessment follow the approved guidelines as delineated in the Domestic Investigations and Operation Guide, the DIOG, and, if so, does that indicate a problem with the DIOG in that it discourages aggressive pursuit of terrorism leads? Should the DIOG be changed to encourage more investigation of leads? When was the DIOG adopted, and how does it differ from previous guidelines? And then I want to ask you something, were outside groups involved in the development of the DIOG?

Mr. GIULIANO. Sir, I don't think so. I think that was an internal—

Mr. WOLF. Was CAIR ever inquired and asked to speak, to comment on the DIOG?

Mr. GIULIANO. No, sir.

Mr. WOLF. Okay. When the DIOG was adopted, how does it differ from previous guidelines? And do you believe should the DIOG be changed to encourage more investigational leads based on the circumstances in the Webster report that you have looked at? It is mentioned in the Webster report.

Mr. GIULIANO. Okay. So just to try to hit all your points here, sir. The first question, did the agents follow the DIOG the way it was written at the time, and the answer is that they did.

Mr. WOLF. So if they did, then, an agent followed that. So does that mean the DIOG should be changed to encourage more investigation of leads? Because somehow, as I dig into this, if I say here is an individual A who follows the guidelines, and the guidelines results in 13 people dead and numerous wounded and, based on

the guy like Awlaki who has been involved, he also radicalized the fellow from North Carolina and many others, should the DIOG be changed?

Mr. GIULIANO. So just a couple of things. We have changed a number of things since this occurred. At the time, the lead was set as a discretionary lead, which gave the discretion to cover the lead and how that lead was covered to the Washington field office. That has been changed. There are no longer discretionary leads.

In the DIOG it asks the agents to use the least intrusive methods possible, so it gives us an escalation of our ability to utilize the tools that Congress has given us to investigate those involved, potentially involved, in terrorism. And so what the DIOG basically states is that we need to use the least intrusive means necessary as we escalate the tools that are available to us. So in this case, acting under those rules, the least intrusive means, the agent felt that with the databases he had checked, with the information that came out of the DOD files, with the fact that Hasan used his own name, didn't try to hide it, and his recent promotion, that the Agent had done everything he needed to do based on the information he had.

To answer your second question, the DIOG, the way it is set right now, gives us the tools to do what we need to do.

Mr. WOLF. So you don't think it has to be changed?

Mr. GIULIANO. I don't, sir. I believe we have the tools available to do what we need to do. I believe our investigators are among the most aggressive investigators in not only the country, but in the world. And this is a case when we look back and we armchair-quarterback and second-guess, which Mr. Fattah had mentioned we need to do to make sure that we get better at what we do. I believe the tools are there, I believe the DIOG, the way it is written, gives us the ability to do it, and I believe the fact that it requires us to use the least intrusive means to be able to escalate the tools that you have given us makes sure that we are walking that fine balance between protecting civil liberties in this country and making sure there isn't another 9/11.

Mr. WOLF. The report faults the decision not to interview Hasan. The Washington field office feared that an interview could jeopardize the Awlaki investigation, but the Commission rejects this explanation. Would a pretext interview have been appropriate in this instance and allowable under the DIOG?

Mr. GIULIANO. Yes, sir, to both questions.

Mr. WOLF. The Washington field office also believed that an interview did not satisfy the least intrusive means test; however, a simple records check was clearly not sufficient in this case to uncover the threat posed by Hasan. What further should or could have been done to determine whether Hasan was involved in terrorist activities? Are you confident that in a similar case today—so we don't have another hearing two years from now, another year from now, we are going to wake up and the newspaper some morning and hear that in Fort—you put the last name in—something like this has happened again—what further should or could have been done to determine whether Hasan was involved in terrorist activities? But, most important, are you confident, and is the FBI confident, is Director Mueller confident, is the leadership confident

that in a similar case today, an agent would feel empowered to pursue where their instincts told them there was something amiss?

And I agree with what Mr. Fattah said, that becomes the whole thing. Would we take the current DIOG, the current circumstances, and are you confident that in a similar case an agent would feel empowered so we did not have another Fort Hood?

Mr. GIULIANO. Sir, there are two prongs to the answer to that question. I think, first of all, the way the information-sharing setup is now with the Department of Defense, at the ground level the FBI shared with the DOD individuals on the task force the information it had. What did not occur, and where there was a clear lapse, is that there was no Headquarters-to-Pentagon sharing of information. Had that happened, there is a possibility we would have seen that DOD looked at Hasan differently where he was, and that may have changed the complexity and the direction of the investigation.

RECONCILIATION OF DIFFERENCES BETWEEN FBI FIELD OFFICES

The second thing that has changed, and we have reiterated, is when there is a difference of opinion between a San Diego and Washington field office, it needs to be pushed up to management so that they will help steer that direction. I think that potentially could have changed what happened. I don't think we will ever know whether an interview would have changed anything, but it certainly would have allowed us to get a better handle on what the FBI had and what the Department of Defense on the ground had and understood.

Mr. DICKS. Mr. Chairman.

Mr. WOLF. Yes?

Mr. DICKS. Just on that point.

Mr. WOLF. Sure.

Mr. DICKS. Why was it that it was not done?

Mr. GIULIANO. Why was the Pentagon not—

Mr. DICKS. Why did it not go up to the higher authority to be reconciled?

Mr. GIULIANO. Sir, that is a great question, and I don't have a good answer for that. It happens every single day where there are disagreements on the complexity, or the tenor, or tone of how we conduct an investigation. They are pushed up to management, they are pushed up to headquarters, headquarters is involved, and in this case the DOD—

Mr. DICKS. Was this San Diego; was this the San Diego office that had sent this in?

Mr. GIULIANO. That is correct, sir.

Mr. DICKS. Was it a lack of aggressiveness on their part?

Mr. GIULIANO. Sir, I think San Diego actually felt that the Washington field office should have done more. They felt they needed to be more aggressive. What did not occur, and what should have occurred, is it did not get pushed up the San Diego chain of command, which I think would have pushed it up to headquarters, where we would have stepped back and most likely said we want an interview to be conducted.

Mr. DICKS. Thank you, Mr. Chairman.

POLITICAL CORRECTNESS

Mr. WOLF. My last question before I go to Mr. Fattah, this recollected phone call between San Diego—and I urge Members to read the report, too. I commend the Bureau. I think the public report almost has as much information as you need without the classified one. The final phone call between San Diego and Washington field office included an exchange about interviewing Muslims who visit extremist websites as a politically sensitive subject for WFO. The conversation was said to have included the comments, “Washington is not San Diego.”

What does that mean to you? Was political correctness a reason why this lead was not aggressively pursued, and, if so, what has been done to prevent the reoccurrence of this?

And I periodically will have a number of FBI agents come up to me—as you know my district is in northern Virginia—who will tell me that they believe there is a political correctness encroaching into the Department of Justice and into the Departments of Defense and Justice and the FBI, and it was said—let me just say, this is a bipartisan thing—it was said during the same thing with regard to the final years of the Bush administration.

So the question is what does that mean to you, “Washington is not San Diego?”

Mr. GIULIANO. I am aware of the comments that you are making, sir, in the report. The report did not find political correctness was in any way, shape or form responsible for his lack of going forward with the interview. That is a snapshot of a conversation that took place. The Agent on the receiving end does not recall that conversation. So it is very hard for me to get into the mind of the one Agent that said it.

I personally do not believe political correctness had anything to do with this determination. I laid out the facts the way the agent did in the Washington field office, what he used to make those decisions. Again, it is easy to go back and second-guess. I believe an interview would have been prudent in this case, but I don’t believe political correctness, nor does the report assert political correctness was the reason for that.

Mr. WOLF. Okay. Sometime during the recess I would like to have the opportunity to speak to the Washington field office people who were involved; obviously do it alone. I just want to ask them, because my sense is—and I am making this official request to meet with them. We don’t really need anybody else there. But I really want to know. And lastly, as I go to Mr. Fattah, I want to make sure this never, ever happens again, where a lead is not pursued because of fear that your career will be ruined because you do something that may very well save people’s lives.

Mr. Fattah.

CIVIL LIBERTIES

Mr. FATTAH. Thank you, and let me thank the chairman.

And let me try to cover a number of pieces to this puzzle. Right after 9/11, the House held some hearings, and former Speaker Newt Gingrich was testifying, and I asked him a question. At that point it was about how far we needed to go to prevent future 9/11s.

I reminded the Speaker that we had criticized countries like China for locking people up without charges, not having access to lawyers, and so forth and so on, and asked what the rule of law was going to be relative to these kinds of new challenges? Because our system of criminal justice was based on the notion that we would rather someone guilty go free than someone innocent be convicted, right? So we kind of leaned on the side of protecting people's rights and due process. But then when you get to terrorism, it is a different issue because you are really trying to prevent the incident from happening in the first place. So you have a lot of challenges.

I don't very much buy into the notion of political correctness. I think that we have an issue around constitutional correctness, when you have an American citizen, as to the question of whether they can listen to or read something or associate themselves in some grouping. It is pretty clear in the Constitution that those things are protected, and then there is a set of actions that are of concern.

Now, this question of radicalization is not new in the military. There have been any number of groups that the FBI has had to be concerned about attempting to either get members trained in the military or to radicalize present members of the military, and this has nothing to do with any particular set of dynamics. This is a concern ongoing.

And I thought that Congressman Dicks' question was interesting. This issue with DOD and the FBI and the issues of coordination is something that we may want to structurally look at a little bit better, because maybe we need to try to create a process in which the FBI could have greater access and maybe even some joint alignment with some of the investigatory units inside of DOD.

I was out at the Terrorist Screening Center in Virginia. The agencies seem to be working very well together, and obviously a lot of good work has taken place, but we do need to be mindful as we go forward that you have constitutional prohibitions or constitutional protections, depending on how one might want to view it. I view it that it is our absolute responsibility to uphold the Constitution, and that each of the agencies of our government have that responsibility. So when we term it political correctness, I think it cheapens the issue. We have a responsibility to follow these rules, and we also have a responsibility to try to create as safe an environment as possible.

FBI RESPONSES TO REPORT'S RECOMMENDATIONS

So I want to go to what the Bureau's response is to these recommendations. Now, they have been made in a number of different categories, and if you could take the time in this hearing, which is about these recommendations and how we are going to go forward, and respond to the recommendations, I would appreciate it.

Mr. GIULIANO. Okay. Thank you, sir. I would just make a couple comments if it is prudent regarding our relationship with the Department of Defense and how it is integrated. They have increased the number of their personnel on our JTTFs throughout the country, and the kind of node that we coordinate all these investigations now occurs at the National Joint Terrorism Task Force, where the Deputy is a member of the Department of Defense. So

that Deputy for the National Joint Terrorism Task Force is a DOD person. He sees every investigation that touches the military immediately and then is the belly button that pushes that over to the Pentagon. So I think that process, that formal process that you spoke about, is in place, and I would be glad to talk to you about that more offline.

We will go through the recommendations and what was done. One of the recommendations surrounded training, and one of the concerns was that there was not enough training for our JTTF personnel, especially as it related to the number of databases that the Bureau has and where collection is stored. We recognized that immediately after 9/11 and brought some 3,000-plus task force officers to be trained on all our databases.

And the Director asked us to look even further at training and to step back and assess whether the training we were giving to our JTTFs as a whole was up to speed, whether it had changed enough with the change in the threat. So we went back and looked at that and changed the way we do training as a whole for our JTTF personnel. And there were a number of online courses they took before they came on, then there was regional training that was mandatory, but now that training has been all moved to Quantico, and it has gone from a couple of days to a nine-day mandatory basic training for everybody.

Mr. FATAH. Now, this is training so that this new system, this Sentinel system—and the chairman has led the way, and we have invested tens of millions of dollars in this system—this is to train the 3,000 officers on this new system to be able to access all of the databases?

Mr. GIULIANO. That is right, sir. The process will continue. As Sentinel now is online, the training for that will continue. Some of the new software we have been able to purchase, again at the behest of the committee, to help us do a better job analyzing data, is also being pushed out and being trained on.

The other issues go to your earlier comments and to Mr. Dicks' comments also with just about the lead being covered, how it was covered, and disagreements, and how those are taking place. There were a number of policy issues around those that were identified and have subsequently been changed. It took too long, in both our opinion and the opinion of the other committees, to cover the lead to begin with, so we have changed policy there. That again reiterates and requires leads to be covered in a shorter time period and duration.

Mr. FATAH. But in plain English, this lead came as a discretionary lead. We have eliminated that.

Mr. GIULIANO. That is right.

Mr. FATAH. There is no discretionary lead, and there is a timeline to follow up on all leads from now on.

Mr. GIULIANO. That is correct, sir. Discretionary leads were discontinued immediately. The timeline for those leads, for the routine leads, was tightened up.

The other thing that has changed is that we have reiterated in a number of venues, and we have changed the written policy on—although the policy always existed—we now have written policy on where there are disagreements on leads, that it needs to be pushed

up to the supervisor and the ASAC in the office and then to the appropriate oversight group at headquarters.

But I think the other point there, going back to Mr. Dicks' comment, is that we have also looked at other cases like Awlaki's and decided that not only do the leads need to be covered more carefully and closely, but they need another group to oversee them. So there are now a robust analytical group back at headquarters that looks at those individuals, like Awlaki, to make sure that there is nothing that is missed in those leads as they go out.

The other thing that was highlighted, and I think rightfully so, in the Commission report was the IT system that was being used to look at the emails. It required the case agents and the analysts to go back every time there was a new email to search it and see what other emails were in the queue. That was fine for the way we used to do business, but on an individual like Awlaki, that system simply was not up to par for what it needed to be.

So now the systems have been changed so that if there is an email of interest where the court authorizes us to look at or we are able to get those emails, the system automatically threads all those emails together, and it also tips the case agents or the analysts when a lead has been set as it relates to that specific email address.

So the point is that some of those other emails that were not pushed to the Washington field office would have been teed up by the system automatically, put into a queue so they can look at them as a whole and maybe make a more informed decision.

Mr. FATTAH. And let's drill down on this in English. Go back to the first point when we have an Awlaki situation. The point is there have been changes, and we went through some of this in the classified briefing, but there have been significant changes to the pruning of the information or the way it is looked at in total, so that you are putting the email from a Hasan together with Awlaki in a way in which you are seeing the whole picture, not just one part of the picture.

Mr. GIULIANO. That is correct, and this system will allow all those emails to be dropped in one bucket and looked at in total.

Mr. FATTAH. Now, the Commission's recommendation on working through challenges relative to the control of determination on leads, right now you said that is going to be bumped upstairs so that anytime there is a dispute between two field agents, field locations, it won't be just settled by muddling through or doing nothing. Someone will have to make a decision.

Mr. GIULIANO. That is right, sir. And that occurs and has occurred every day. What we found when we went back, even though it was the standard operating procedure, there was not clear-cut policy that kind of set that out. So that is what has changed there.

Mr. FATTAH. All right. Now, are there any recommendations that the Bureau does not agree with of the 18?

Mr. GIULIANO. Sir, there is none that we do not agree with. The only one that we continue to wrestle with is their assessment that this lead should not have gone to somebody from the Department of Defense; rather, it should have gone to somebody other than somebody from their home agency.

Our experience is, and my experience at running a JTTF is, that when you push a lead to somebody from that home agency, they are in the best position to understand the nuances of that agency, how to cut through the red tape, how to get the information, how to cover the leads; and in most cases these are investigators within their agencies who have an expertise in investigations. So we are still trying to find that sweet spot between that recommendation and how we make sure there is more oversight from the FBI.

Mr. FATTAH. We have had this discussion before, and I will conclude my questions on this point, which is that at some point this became a subjective matter. So you can look at the employee file, and you can see the top secret clearance. You can see the recent promotion, and one could have seen that as a reason to be more concerned, and one could have seen that as some type of information that would say, well, there is no reason to be concerned. Some of it has to do with one's view of their responsibility.

And so when we get to what might be potentially ordinary criminal activity, that is one judgment call. When the judgment call is about saving lives, then that is where the FBI's post-9/11 role, if you would, this prevention role, comes in. I know you personally agree that there should have been this face-to-face interview. That is not to say that Hasan may not have been able to get through that interview in a way that would have alleviated people's concerns, but that there should have at least been eyes on him and a talk directly with him, because you really were not trying to track down bank fraud or some other unrelated matter. The issue here really was whether or not there was something more nefarious afoot relative to a potentiality that wasn't necessarily based on some rational criminal enterprise.

So I thank you for your service to the country.

Mr. DICKS. Would you yield just briefly?

Mr. FATTAH. I would be glad to yield, yes.

HASAN EMAILS TO AWLAKI

Mr. DICKS. On one of these emails, apparently that came in December of 2008, his first one laid out a question: What would al-Awlaki think of Muslims who have joined the military and have even killed or tried to kill other U.S. soldiers? That seems pretty stark to me.

Mr. GIULIANO. Yes, sir.

Mr. DICKS. I don't know how you use the he's doing a master's degree or something to justify not looking into that.

Mr. GIULIANO. Sir, I don't disagree. As you go to the next line, it says, "can you make some general comments about Muslims in the U.S. military? Would you consider somebody like Akbar or other soldiers that have committed such acts fighting Jihad, and if they did, what would it mean to you?"

Agree, when you look at it in its context exactly how it is, it is startling. The problem is if you put yourself back into the agent's position at the time, and you look at this email with what he is looking at on the performance appraisal where it states, and I quote, he is going for his master's of public health, Hasan has outstanding moral integrity and concern in all matters, he took on a challenging topic for his MPH. The project related to the impact of

beliefs and culture on views regarding military service during the global war on terror.

So without any question, while it sits by itself, I concur with you 100 percent. When you look at it from this aspect, it changes the dynamics a bit. Again, I am not here to make excuses.

Mr. DICKS. But, you know, so many times in the history of this country, we have the information and did not act on it. I mean, people going to flight schools to learn to take off—how to take an airplane off but not land it, and that was sent to the FBI, and people—and nobody acts on it. I mean, you know, at some point you have got to have some instinct, some gut instinct that something is not right here, and to follow through. Pearl Harbor could have been avoided. I mean, all of these things, we have the—what is always so frustrating as you look back in 20/20 hindsight, what is so frustrating is we have the information, we knew this guy—that this guy had a relationship with al-Awlaki, and we didn't act. That is what frustrates me.

Thank you for yielding.

Mr. WOLF. Thank you, Mr. Dicks.

Mr. Culberson.

Mr. CULBERSON. Thank you, Mr. Chairman.

I could not agree more with Mr. Dicks' statement and really appreciate Chairman Wolf having this hearing today. And I want to thank you, Mr. Giuliano, for your service. We, all of us, admire the FBI and the work that you do.

It is important, though, that we all, as Mr. Dicks has said and the chairman has said, learn from this, and it is distressing to see, as Mr. Dicks has said, the one sentence, looking at that December 2008 email. Looking at that one sentence, you don't really need the context, the statement itself is of real concern.

DISAGREEMENT BETWEEN SAN DIEGO AND WASHINGTON FIELD OFFICES

And I wonder if I could zero in on the question that Chairman Wolf asked in a little more detail if I could, sir, that when the Washington field office had assumed because they were the recipient, I understand, from—it is a standard practice at the FBI that the Washington field office in this case—looking at page 46 of the report—that the Washington field office owned the Hasan lead and bore ultimate responsibility for its outcome because it had been referred to the Washington field office by the San Diego office, and the San Diego office was not satisfied with the Washington field office's response. The San Diego agent believed the assessment was slim and was concerned enough that for the first time in his career I see that the San Diego officer followed up with the Washington field office to pursue this because they couldn't—the San Diego office could not understand why the Washington field office would not pursue this lead and actually go out and interview this guy.

And I see from the report, Mr. Giuliano, that the FBI had a policy, and I don't know whether you still do or not, of pursuing an investigation in the least intrusive—using the least intrusive means necessary. Is that correct?

Mr. GIULIANO. That is correct, sir.

Mr. CULBERSON. And that in this case the least intrusive—the Washington field office decided that the least intrusive means necessary was essentially to do a check of the records and not conduct the interview because they were—the Washington field office was concerned it might affect Major Hasan’s military career?

Mr. GIULIANO. So——

Mr. CULBERSON. That was one of the factors.

Mr. GIULIANO. That is correct, sir. As the Webster Commission went and talked to the agents, as he laid out all the reasons he felt that an interview wasn’t germane at the time, that was one of the comments.

I do want to make a comment about least intrusive. Least intrusive does not mean and has never meant not aggressive. I will tell you, and I can’t talk about it in this setting, but the investigations that we have across the Nation and the world are extremely, extremely aggressive.

This was a judgment call, and unfortunately we make these judgment calls every single day, and we have to be right every single time. As you look through it, an interview would have been prudent in this. It is hard to tell whether it would have changed things. But the fact that we use the least intrusive means is just a way to ensure that we use the tools that Congress has given us in a way that they are ratcheted up appropriately. That is the purpose. That should not have and does not mean that we cannot conduct interviews when we deem it appropriate.

Mr. CULBERSON. Sure. But in this case, looking, the assessment was made by the Washington field office that it would be—it would perhaps endanger Major Hasan’s career if they pursue this any further.

Mr. GIULIANO. That was one of the statements that was made, sir.

HASAN EMAILS TO AWLAKI

Mr. CULBERSON. Okay. And as Mr. Dicks just pointed out quite correctly, the email, just looking, for example, at the December 17, 2008, email, Major Hasan, you know, asked the question that there is—I am looking for it in here—that “some appear to have internal conflicts or may have even killed or tried to kill other U.S. soldiers in the name of Islam.” Clearly he is asking a question to Awlaki whether or not that is—if a Muslim in the military tries to kill other U.S. soldiers, is that a problem? You know, is that something that Muslims’ faith would—what would the Muslim—you know, how would Awlaki look at that from the perspective of the Muslim faith? What if that email had come from a senior FBI officer?

Mr. GIULIANO. Sir, I think it would have raised the same concern from San Diego as it did with the individual being in the military. I think the difference here is when you have a guy like Hasan who is doing research on that very issue, it says, “can you make some general comments about Muslims in the U.S. military,” I think it puts it in a different context. Again, I am not here to make any excuses as to whether that interview was conducted or not, but it just puts it in a slightly different context.

Mr. CULBERSON. Yes, sir. No, I understand. What I am driving at is another point. If the email had been sent by a senior officer

in the DEA, or Department of Homeland Security, or Border Patrol, or some senior law enforcement officer, some senior officer in the law enforcement community of the United States had sent that email to a maniac like Awlaki, what would have been the response in the FBI in a similar set of circumstances, had Hasan been in the U.S. law enforcement community?

Mr. GIULIANO. Two things. I think it is important to remember that Awlaki then was not the Awlaki now. Awlaki had thousands of people writing to his website asking for legitimate Islamic advice. So it is a slightly different Awlaki back then. That is number one.

Number two, if the DEA or the FBI agent had been writing a thesis that was similar to what Hasan did, there may have been a different viewpoint. However, I think San Diego would have looked at it with just as much alarm as they did when they sent this lead to the Washington field office.

Mr. CULBERSON. What I am asking you is to think about the same set of circumstances, but the guy is not in the U.S. Army, he is a senior officer in the U.S. intelligence service, or he is a law enforcement officer. It seems to me that the statement itself and the fact that the individual is working for the U.S., is in the U.S. military or in the U.S. intelligence services or U.S. law enforcement, that Major Hasan's position alone should have been enough to require further action on this.

Mr. GIULIANO. Sir, again, I think that is debated at the Commission, and I think they would find that we should have done more, and I don't deny that.

CHANGES TO FBI POLICIES

Mr. CULBERSON. Have you changed the policy so that if it is an officer, if you find somebody in a high-level position in the U.S. law enforcement community, or in the Intelligence Community, or the U.S. military making inquiries like this, that it automatically kicks it up to a higher level of inquiry, including a personal interview automatically?

Mr. GIULIANO. Well, sir, there are no automatics in what we do, but what we have changed is if there was somebody in law enforcement or somebody in, say, the Department of Homeland Security where we saw something like this, it would come up to headquarters the same way now that an investigation of DOD does mandatorily, and it would go to the National Joint Terrorism Task Force where there would be another set of eyes on it. So that has changed.

Mr. CULBERSON. I should not have used the word "automatic." I heard you say earlier that where there is a conflict between two field offices, you now have a procedure in place where that is reviewed by a senior-level official, and that is a change and an improvement.

Mr. GIULIANO. Yes, sir, that is correct.

Mr. CULBERSON. So I shouldn't use the word "automatic." What I am driving at is regardless of whether or not this guy was in the military or not, you have policies in place now that would elevate the scrutiny of an email exchange like this if the individual is an

officer in either the military or the U.S. law enforcement community?

Mr. GIULIANO. That is correct. It is not just email, sir, it goes a little further. If we have an investigation that is predicated on law enforcement, on somebody who holds a secret security clearance, or has access to military bases, then we have even broadened it wider than that.

POLITICAL CORRECTNESS

Mr. CULBERSON. The chairman has always been very generous with the time, and I will just close with this, and I will do some other follow-up when I come back. But talk to us a little bit about the political sensitivity. You do have a reference in the report on page 60 that the Washington field office indicated the subject is, "politically sensitive." What types of things are politically sensitive in inquiries of this type?

Mr. GIULIANO. I will go back to the comments made by Mr. Fattah that I don't believe political sensitivity had anything to do with decisions that were made here. The Commission found, I think, the same exact thing, that there are sensitivities as it relates to First Amendment, there are sensitivities as it relates to civil liberties and civil rights. and I think our job with the powers given to us by Congress are to make sure that we keep this country safe while protecting civil liberties and civil rights. It is a fine balance every single day.

Mr. CULBERSON. Yes, sir.

Mr. GIULIANO. I don't believe political sensitivity played any part in his decision, sir.

Mr. CULBERSON. We know you do, sir, and God bless you all for what you do, and we are deeply, deeply grateful for the FBI and all that you do.

To your knowledge, do you have any memory or discussions about political sensitivity and whether or not it is politically sensitive or could be offensive to the Muslim community or the Islamic community to pursue? Not with reference to a particular lead, but to what extent have you seen or heard discussions within the FBI or the DOJ about political sensitivity or insulting or offending the Muslim community?

Mr. GIULIANO. There is very little talk about political sensitivity inside the Bureau. The Bureau is an apolitical organization, and we try to stay apolitical. There are sensitivities as it relates to training; there are sensitivities as it relates to the First Amendment and civil liberties. Those are things that we always look at, always strive to find the right balance between both, and as you know, sometimes finding that balance is very difficult because there are strong advocates on both sides of the table. But where I sit in my position as the Executive Assistant Director for National Security, I am not concerned about political sensitivity in what we do to protect this Nation.

Mr. CULBERSON. We deeply appreciate all that you guys do. We are very proud of you and immensely supportive of the FBI. Appreciate it.

Thank you, Mr. Chairman.

Mr. WOLF. I am going to go to Mr. Carter, but I think, Mr. Giuliano, you are misleading or overstating something. I read the Commission report twice, and I want you to tell me what page it says that there has been no political correctness, no political sensitivity. The Commission does not deal with it or against it; it is silent on it. So you have led us to believe that the Commission just totally said that is not a problem. So would you tell me the page that I missed where it says that that is not a problem?

Mr. GIULIANO. No, sir, I think my point is that if you look at the reasons that the Committee set forth as to why the interview was not conducted, it does not say in their findings that it was because of political sensitivity.

Mr. WOLF. But nowhere does the Commission—

Mr. GIULIANO. That is correct, sir.

FBI ROLE IN RELEASING AWLAKI FROM CUSTODY

Mr. WOLF. Okay. So then you were incorrect. Okay. I just want the record to show that because you sort of—also one other issue, and, Mr. Carter, I want to get to you, too, but I think you misled us, too, in another way, probably inadvertently. You indicated that the decision to drop the warrant was made by Diplomatic Security in the U.S. Attorney's Office, but it is my understanding that the Washington field office agent was Wade Ammerman who made the call to release Awlaki. So the Washington field office was conducting a full investigation of Awlaki at that time, and also Ammerman was involved in the paintball case. Do you remember the paintball case?

Mr. GIULIANO. Yes, sir, I do.

Mr. WOLF. And that person is in jail, I believe, for life, correct?

Mr. GIULIANO. I don't know that, sir.

Mr. WOLF. Well, I think he is. You might want to check that out.

And there was some inference that maybe Awlaki was connected there. So when you answered the question, you sort of said, you know, that is not our game, that was Diplomatic Security. This was a Washington agent of the FBI who called to say to drop the case, and he was the very agent who apparently is still with the FBI today and was the FBI agent on the paintball case.

But those two things are sort of misleading. It is sort of like brush and bump and move. They were involved. This was done at the request of an FBI agent, correct or not correct?

Mr. GIULIANO. That is incorrect. An agent of the FBI cannot tell a prosecutor whether to drop a case or not. We don't have that power.

Mr. WOLF. To drop the warrant?

Mr. GIULIANO. To drop a warrant, drop the case.

Mr. WOLF. He never called?

Mr. GIULIANO. There was a dialogue—

Mr. WOLF. Ammerman never called, then, on that Sunday—was it a Sunday morning or a Tuesday morning?

Mr. GIULIANO. Yes, sir, there was a dialogue between them, as there always would be. If a case agent has a case on somebody that is coming into the country, the system is triggered and set up so that there will be a call to that case agent.

Mr. WOLF. What time was that?

Mr. GIULIANO. Sir, I don't know what time it was.

Mr. WOLF. Was it a Sunday? Was it early in the morning?

Mr. GIULIANO. I can't—

Mr. WOLF. I think I really want to get to the bottom. We are going to send a letter on this. If we can't, we are going to get a hearing. If we have to, we may even subpoena the thing. But I think it is important.

The inference was that the Bureau had nothing to do with it, when, if there was a call from an FBI agent who had worked the paintball case, that has a bearing to a U.S. attorney. And my sense was it could have been very early in the morning when most offices are not even open in the Federal Government. I think it could be, and I could be corrected; I think it was like, we are going to get this for the record, put it in at this point. I think it was somewhere before 7:00 in the morning, perhaps on a day when the government was not operating. So I think it has been a little misleading.

Mr. GIULIANO. Sir—

Mr. FATTAH. Can we give the witness a chance to explain?

Mr. WOLF. Sure, absolutely.

Mr. GIULIANO. I disagree with that comment. No matter what time it was, an FBI agent does not have the power to tell a prosecutor whether to drop a case or not. The prosecutor makes that call based on the evidence that is at hand. So if the prosecutor at the time, regardless of whether a call was made or not, looked at that evidence and decided there was not enough to be able to arrest that individual, as would be in any case, that warrant would be dropped. But I assure you, the Bureau, if anything, at that point would have—if we could have incarcerated Awlaki, we would have.

Mr. WOLF. Well, we can go back and forth, and if so, I am going to go to Mr. Carter. The FBI agent could have said something else.

Mr. GIULIANO. I don't know—

Mr. WOLF. And so with that, let me just go to Mr. Carter.

Mr. Carter.

VICTIMS OF FT. HOOD ATTACKS

Mr. CARTER. First, I would like to thank the chairman and Mr. Fattah for allowing me to participate in this hearing. I have got a little bit different line of questioning because I have a constituency to answer to, and I have had a lot of questions that have been raised, and I want you to tell me what you think I should tell these people that ask me this question.

We are talking about people who were killed, many of whom had been deployed two, three, four times, fighting in the war against terror, which until recently was the subject matter of why we went to war. It seems to have changed in this administration, but in the previous administration it was the war on terror. They went to fight the war on terror.

Now we have got them coming to me and saying, "my husband went in harm's way for this country three times," or "my son went in harm's way for this country four times, and he gets killed where he is stationed by a member of his own military, who begins his shooting career as a murderer by shouting, 'Allahu Akbar.' And it gets investigated by the Department of Defense, and they find it was a workforce violence incident. And nobody seems to even talk

about is the war against terror even involved in this killing, but my husband is dead, or my son is dead after fighting for this country on numerous occasions in the war against terror in an Islamic community.”

And what I got from the Defense Department was a whole series of excuses for why they didn't catch this, and they have a whole series of recommendations to change their procedures so that they can hopefully catch it next time. And then the agency, the law enforcement agency, that at least historically in America in my lifetime Americans have looked to for the highest and best investigative procedures in the world—not in America, in the whole wide world, at least in my generation. Anybody that said, we need this investigated, who does the best, we would say the FBI. And so this same person comes to me and says now from the law enforcement community what do I get? I get the same story.

Yeah, mistakes were made, but really it is more excuses being made as to why, quote, procedures didn't work. When did we stop having people who use their brain to investigate and start having people who use procedures to investigate? Have we discovered that procedures written by bureaucrats actually operate better than somebody's common sense that says, “look at this; this looks like this guy's talking about shooting somebody, maybe we ought to look into this”?

What do I say to that woman who has lost her husband or to that father who called me and lost his son and say, “who can I look to in my government that my son or my daughter has fought for that will stand up and say, ‘it is our job, it is our responsibility, we failed,’ instead of making excuses and coming up with new procedures”? Can you tell me what I say to them?

Mr. GIULIANO. Sir, I don't think there is anything you can say to them that will take away the pain that they have suffered. As I stated at the beginning, I am not here to make excuses. We will not make excuses. They should and do turn to the FBI to do exactly what you said, and we have to be right every time, 100 percent of the time, and when we are not, the consequences are dire.

So I make no excuses. Our goal is to figure out what could have been done better. We strive to be better every single day. This entire Commission report was commissioned by the Director after the Senate already did their review, and after we did our internal review, to make sure that it never happens again. He is committed to it, I am committed to it, our department is committed to it, but I am not here to make excuses.

Mr. CARTER. Well, you just made a statement that I would like to know the answer to. The consequences will be dire. What are the dire consequences as a result of the failure of the FBI?

Mr. GIULIANO. So the Commission——

PERSONNEL ACTIONS WITHIN THE FBI

Mr. CARTER. Who got fired? Who got changed, promoted, moved, whatever? I would like to know what those situations were.

Mr. GIULIANO. Any action taken by the Bureau has to be held until this report was done. This report has been pushed over to our Inspection Division, which handles all reviews of how our individuals conducted themselves during the investigation, and once that

is done, it will be pushed to the Director for a determination of what action, if any, should be taken.

Mr. CARTER. What kind of time schedule are we looking at on that action?

Mr. GIULIANO. I would say between 60 and 90 days, sir.

Mr. CARTER. So I think I can tell those people at least that as far as the FBI is concerned, there are dire consequences, that is your statement, that will come to the people who failed in this project.

Mr. GIULIANO. Sir, if I can just reiterate, I said when we fail, there are dire consequences to the public. I do not and cannot—

Mr. CARTER. To the public. Oh, that is a different statement. You said, when we fail, there are dire consequences. Of course we know there are dire consequences. There is a bunch of dead people stacked up at Fort Hood right now that are dire consequences.

Mr. GIULIANO. That is exactly right, sir. My statement was that where I sit, we have to be right 100 percent of the time every day, every time, and if we are not, there are dire consequences, as you see at Fort Hood.

What occurs here internally will be determined by our internal inspection process, and it will go to the boss once they conduct their review. So I am sorry if I misspoke there.

Mr. CARTER. Well, okay, then, that is a good explanation. Then maybe there won't be dire consequences.

I just think at some point in time we have to decide, we have all known our rights, and we are all protecting not only our rights, but we are protecting the rights of an awful lot of other people, and I don't have a problem with that, I have done that for most, if not all, of my life. But more and more I have people asking me, who is going to take responsibility for this, instead of just telling us, oh, it is really not our responsibility, it is our procedures were bad? Well, if your procedures were bad, and you wrote them, you are responsible, and so is the Defense Department.

POLITICAL CORRECTNESS

And both of you have gotten through this, both reports, and you say there is no political correctness, but how do I explain to them that still we get no indication of a man with a heavily loaded automatic who walks down shooting uniformed soldiers who have either been to war or are on their way to war? It is not a battlefield, it is not a war action, they are not entitled to the benefits of a soldier at war, and yet they are dead, or they are wounded, or they are shot in the brain, and they are having to rehabilitate themselves to just stay alive.

All these things have happened to these people, and nobody is even defining the enemy. And I just don't understand why the two—two of the most important agencies of this government still haven't defined what happened at Fort Hood by even mentioning that radical Islamic terrorism had anything to do with it. If he yelled out, "Jesus Christ is God," would they have said Christians were involved? I mean, at what point does it get to be radical Islamic terrorism?

Mr. GIULIANO. So I will just—

Mr. CARTER. That is the simple question. Answer that one.

Mr. GIULIANO. Okay. There is a difference between somebody who is tied to a terrorist group, an Islamic terrorist organization, which we could not tie Hasan to during our investigation, and somebody who appears to have been radicalized by them. Again, I am not here to make excuses. Where the difficulty lies is when you have somebody like Hasan or so many others who are listening to somebody like Awlaki and trying to determine that difference between what is in their head, their radicalization, and their subsequent mobilization, and that is just something we did not foresee. And the question here is whether, if we had moved forward and done an interview, would that have changed the facts?

Mr. CARTER. Well, you know, once again, getting back to this wife or this father that contacted me, they would say, "But wait a minute, all this stuff he was talking to this guy Awlaki about, isn't this the same guy that our President told us that he authorized a hit on because he was a terrorist, and we killed him with a drone?"

Mr. GIULIANO. So, again, sir—

Mr. CARTER. It certainly is. And now we say, but hindsight is 20/20.

Mr. GIULIANO. Again, there is no doubt that the Awlaki who met his demise recently was a different Awlaki than we knew and understood back during this time. Again, no excuses, but Awlaki had not been involved, that we could tell, operationally at this point. It does not change the facts, but he is and was a different person at the end of his life.

RESPONSIBILITY FOR PROTECTION OF AMERICANS

Mr. CARTER. Well, finally, I guess, I better quit, but I want to say one more thing. 9/11 took place, but if the American people really look at it, all we did was say, we screwed up, even though there were all kinds of indicators not only for your agency, but for others that should have kept those people in New York alive and at the Pentagon alive, but we failed. We have spent trillions of dollars to fix that problem, and the next incident we have, we failed.

Who does the American individual look to to protect us? The Defense Department? No. The FBI? No. Who is responsible? I think I am. I think most of the people sitting on this dais think they are. And we depend on you and the other folks that are involved in this fight with us to be effective, and, quite honestly, if the average American is going to be frightened as to who in our government is protecting them from these people who want to kill us after 10 years, 12 years.

Mr. FATTAH. Judge, if I could just interrupt you for a second to say that it is a very unfortunate incident at Fort Hood, but I want to make sure that the record is clear. There have been many, many, many other instances where the FBI have prevented circumstances that would have harmed Americans since 9/11. So I don't want you to say that this was the next incident. This was a circumstance in which the FBI did not hire Hasan. They did not give him a gun. They did not let him on this base. They did have a shot at looking at this email, and they made the wrong call.

But I think that you are correct that in the DOD, which had plenty of opportunities over a period of years to look at this person and to make some judgments, is more accountable than the cir-

cumstance in which someone gets a discretionary lead to take a look at.

So I just want to be clear that, at least for my view of this situation, that this was, I think, preventable. I am not sure it was preventable in terms of where we put the weight, I think more on the DOD side than on anyone else. So I just want to make—

MOTIVES OF FT. HOOD ATTACK

Mr. CARTER. And I thank the gentleman for the comment, and I realize my time has probably run out, but I want to point out that the frustration level, at some point in time somebody has got to be able—that has some authority—and this was a Commission that looked into this incident as it relates to our law enforcement authority. If the DOD should have declared it a radical Islamic terrorist event, and they did not, and that had some influence on what happened from the law enforcement side, it ought to be part of the report.

What shouts from these two reports is that there is nothing in it. As the chair reported out, there is nothing in it to indicate this had anything to do with what we have spent 10 years fighting a war about, and it dumbfounds me, and you cannot explain it to people who lost their families and now are being treated as if they were just casualties of the workforce. It really is hard to explain, and that is why I wanted to protest.

Thank you.

Mr. WOLF. Well, I think what Judge Carter is saying, and I share his concerns, is that there were 170 or more people from my congressional district that died in the attack on the Pentagon. On the day of the Pentagon, I rushed out and sat on the hill there, watching what was taking place. We won't make this into a 9/11 hearing.

And let me just back up, too. Mr. Giuliano, you are a good guy. I talked to some agents out in my district, and I said, this guy Mark Giuliano is coming before me, what kind of—they said, he is a good guy. I don't think that is the issue here, and I don't think you should take this personally, as somebody has said.

Mr. GIULIANO. No, sir, I don't.

Mr. WOLF. But the Washington office, somebody in Washington failed to open the Moussaoui laptop. Had the Moussaoui laptop been opened, we don't know, maybe—and this is not a 9/11 Commission hearing, but maybe Debra Burlingame's brother would still be alive, maybe Ted Olson's wife would still be alive.

And so what Mr. Carter is saying and others, and I agree with what Mr. Fattah is saying, these people just don't understand, and the Moussaoui laptop was not opened, and we see that there were recommendations coming from your guy out of Phoenix with regard to flight schools, and there were things missed, and we want to make sure that nothing is missed in the future.

Also, I have other questions that I want to go through, but we are going to do a letter to you on this. I think people just have to think about this. I think you were misleading on the Awlaki case. The dates and the times were Awlaki came in and he was arrested up in New York at 4 a.m. That is 4 a.m. Denver time. The U.S. attorney is out in Denver. I know a lot of U.S. attorneys work hard,

but at 4 a.m., where is he? He is probably home. At 5:40 they drop the case. Awlaki is arrested, and they drop the case at 5:40 in the morning, Denver time. Then he takes a flight to Washington. The U.S. attorney is in Denver, the Agent is calling from the Washington, D.C., area, so all this decision was done by 5:40 Denver time. Wow, that is amazing.

Mr. GIULIANO. Sir, can I just make a comment?

Mr. WOLF. You can, sure. Go right ahead.

Mr. GIULIANO. The Agent knew he was coming in before that.

Mr. WOLF. I am sure he did, I am sure he did. If you go back and check, in fairness, because I know you are a good person, go back and check. If you don't think you were a little misleading, then I think we went to different high schools, we have different approaches to things. But you acted like the FBI had no involvement whatsoever.

Now, while the FBI cannot tell them to drop it, the FBI can make a recommendation. And so what we will do, we will give you a letter with the whole fact pattern, asking you to comment.

[CLERK'S NOTE.—The following letters were exchanged subsequent to the hearing.]

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

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SUBCOMMITTEES:

CHAIRMAN—COMMERCE-JUSTICE-SCIENCE

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Congress of the United States
House of Representatives

August 15, 2012

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The Honorable Robert S. Mueller III
Director
Federal Bureau of Investigation
935 Pennsylvania Ave NW
Washington DC 20535

Dear Mr. Mueller:

I am raising the concerns detailed in this letter because it is the responsibility of the Congress to conduct oversight of the Federal Bureau of Investigation (FBI) and this subcommittee, which I chair, has the direct task of funding the bureau with money provided by the citizens of the United States, including the families and loved ones of those killed at Fort Hood in 2009.

I was sorry that you were not available to testify before the House Commerce-Justice-Science Appropriations subcommittee on August 1 for the hearing on the Webster Commission report on the FBI's investigation of U.S. Army Maj. Nidal Hasan. As you know, Maj. Hasan has been charged with the murder of 13 individuals following his terrorist attack on Fort Hood in November 2009; his long overdue trial is reportedly scheduled to begin next week. The release of this long-awaited report provided an opportunity for the Congress to learn about the bureau's efforts to improve its counterterrorism operations and investigative practices to prevent future attacks.

I am concerned that the bureau's witness at this recent hearing, Mr. Mark Giuliano, the executive assistant director for national security, made comments to the committee that I believe were misleading or incorrect with regard to the nature of findings in the Webster Commission report and the FBI's understanding of Anwar Aulaqi at various points over the last decade. I know Mr. Giuliano has had a distinguished career at the FBI and perhaps felt uncomfortable testifying in public.

I have summarized in detail each comment made by Mr. Giuliano that I believe was potentially misleading, uninformed or incomplete. As part of the record, I am asking you to respond to each of these statements and to provide the committee with the bureau's official position. Specifically, I request your clarification on the following six statements made by Mr. Giuliano during the hearing:

1. Statement on the Webster Commission findings on the role of "political correctness" in the FBI's decision not to interview Hasan or his colleagues.

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2. Statement on Hasan and Aulaqi's relationship.
3. Statement on FBI's perception of full nature of the Aulaqi threat.
4. Statement on Aulaqi's relationship with 9/11 hijackers.
5. Statement on Aulaqi as confidential informant for the FBI.
6. Statement on Aulaqi's 2002 return to the United States.

I also have enclosed a detailed timeline produced by the New York Police Department summarizing what information is publicly known about the FBI's interactions with Aulaqi through 2009. I request that the bureau affirm or correct the record for each of the events on the enclosed timeline to provide the Congress with a detailed understanding of the bureau's interactions and knowledge of Aulaqi's activities.

1. Statement on Webster Commission findings on "political correctness."

I asked Mr. Giuliano whether political correctness may have played a role in the decision by the Washington Field Office (WFO) task force agents not to further investigate Hasan after receiving a lead from San Diego Field Office (SD) task force. In response to my question, Mr. Giuliano stated, "the [Webster Commission] report did not find political correctness was in any way, shape, or form responsible for his lack of going forward with the interview [of Hasan or his colleagues]."

Mr. Giuliano's statement was not accurate. The Webster Commission report explicitly notes on pages 81 and 82 that the SD officers were told by WFO officers that "political sensitivities" were a factor in the WFO's decision not to investigate Hasan further. Although the Webster Commission report includes no analysis of these findings, I believe they merit a much more thorough review.

I repeatedly asked Mr. Giuliano to cite the section of the report that found that there was no political correctness "in any way, shape, or form," but he refused. When I confronted him about misleading the committee, he admitted that I was correct on that point. Later in the hearing reversed again and said that he and I just "disagree" on that point.

Please confirm for the record whether the Webster Commission report conclusively determined, as Mr. Giuliano testified, "the report did not find political correctness was in any way, shape, or form responsible for his lack of going forward with the interview" and provide me with the citation, as I asked him to do during the hearing.

2. Statement on Hasan and Aulaqi's relationship.

I asked, "Did Aulaqi ever meet with Major Hasan in Virginia?" and Mr. Giuliano definitively responded "No, not that we know."

This statement is contrary to a number of published reports, including a February 1, 2010, piece in *The Weekly Standard* that reported, "[Aulaqi] met Hasan when Hasan's mother died in early 2001, and [Aulaqi] presided over her funeral."

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Please confirm for the record whether or not Maj. Hasan and Aulaqi met while he served as imam for the Dar al Hijrah mosque in Falls Church, Virginia. If so, please provide a summary of the FBI's full understanding of their encounters, including the funeral.

3. Statement on FBI's perception of full nature of the Aulaqi threat.

I asked Mr. Giuliano if he agreed that violent Islamist extremism was a cause of the Fort Hood terrorist attack. He refused to comment, but said "Clearly, Anwar Aulaqi was an individual who was well known in the community, he was a – a propagandist at that point back in that time."

In a later response to a question from the subcommittee's ranking member, Mr. Fattah, Mr. Giuliano stated, "So [Aulaqi] changed and he changed a lot over the years. When he went to prison in Yemen in, you know, '06, '07 and as he came out and came back up online in early '08, [Aulaqi] still had somewhat of a moderate tone but – but began to be more of a propagandist, began to show more radical tendencies, but we could not and the [Intelligence Committee] did not see him as operational or in an operational role at that time."

Aside from Mr. Giuliano's troubling failure to acknowledge the obvious about Maj. Hasan's violent Islamist extremist motivation for the attack, I was troubled by his characterization of the Aulaqi threat in 2009 – including his assessment that Aulaqi "still had somewhat of a moderate tone" as late as 2008. This statement, quite simply, is fundamentally false.

According to a February 27, 2008 *Washington Post* article by Susan Schmidt titled "Imam from Va. Mosque Now Thought to Have Aided Al-Qaeda," a U.S. counterterrorism official speaking on the condition of anonymity said, "There is good reason to believe Anwar Aulaqi has been involved in very serious terrorist activities since leaving the United States, including plotting attacks against America and our allies." Again, this article was published in early 2008, the same period of time that Mr. Giuliano asserted that Aulaqi "still had somewhat of a moderate tone" and alleged that the U.S. Intelligence Community "did not see [Aulaqi] as operational or in an operational role at that time."

Additionally, according to the article, Aulaqi had a very long record of radical rhetoric – not the "moderate tone" as Mr. Giuliano alleged. Schmidt noted that just six days after 9/11, Aulaqi wrote on the "IslamOnline" Web site that the FBI "went into the roster of the [hijacked] airplanes and whoever has a Muslim or Arab name became the hijacker by default," and months later Aulaqi "posted an essay in Arabic titled 'Why Muslims Love Death' on the Islam Today Web site, lauding the fervor of Palestinian suicide bombers."

Schmidt also reported that "In one speech apparently made in 2006, [Aulaqi] predicted an epic global clash between Muslims and 'kfur,' or nonbelievers. 'America is in a state of war with Allah,' he said, referring to the fighting in Afghanistan and Iraq. He praised the insurgency

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in Iraq and 'martyrdom operations' in the Palestinian territories. Muslims must choose sides between President Bush and the 'mujaheddin,' he said. The solution for the Muslim world, he said, 'is jihad.'"

If these comments were all made prior to 2008, how can Mr. Giuliano honestly state that Aulaqi still had a "moderate tone" and was not operational as late as 2008?

Even within the FBI, many believed Aulaqi was a far more serious threat around 2009 than Mr. Giuliano indicated. The Webster Commission report specifically noted that at least certain sections of the bureau perceived the threat posed by Aulaqi around 2009 as more substantial than a "propagandist" or radicalizer. Specifically, the unclassified version of the Webster Commission report notes "SD-Agent and SD-Analyst believed Aulaqi had [ambitions beyond radicalization]," which conflicts with Mr. Giuliano's description of Aulaqi as merely a "propagandist at that point back in time."

There is ample evidence that Aulaqi had demonstrated operational roles in terrorism activities far earlier than 2009, despite Mr. Giuliano's assessment. A detailed examination of Aulaqi's record -- based on publicly available reports -- clearly demonstrates Aulaqi's history of operational actions and associations with al-Qaeda affiliated groups and individuals.

When the Treasury Department "designated" Aulaqi under Executive Order 13224 in July 2010, its press release included a quote from Stuart Levey, the under secretary for terrorism and financial intelligence, stating, "[Aulaqi] has involved himself in every aspect of the supply chain of terrorism -- fundraising for terrorist groups, recruiting and training operatives, and planning and ordering attacks on innocents." The release indicates Aulaqi's operational role starting as early as January 2009 -- the exact same timeframe I asked Mr. Giuliano about during the hearing. How did Treasury come to a different understanding of Aulaqi's role in early 2009 than the bureau?

Additionally, the Treasury Department's release specifically notes that Aulaqi was "imprisoned in Yemen in 2006 on charges of kidnapping for ransom and being involved in an al-Qaeda plot to kidnap a U.S. official." This plot and his subsequent arrest certainly indicate that Aulaqi was far more operational prior to 2009 than Mr. Giuliano indicated.

Aulaqi, himself, wrote of his radicalization in the early 1990s. In his final column for al Qaeda's *Inspire* publication, before his death last year, Aulaqi wrote about his radicalization and his early affiliation with al Qaeda-affiliated groups, which was not referenced in the Webster Commission analysis of Aulaqi's record. Aulaqi wrote that following the Gulf War, "That is when I started taking my religion more seriously and I took the step of traveling to Afghanistan to fight," in 1993. "I spent a winter there and returned with the intention of finishing up in the U.S. and leaving Afghanistan for good. My plan was to travel back in summer. However, Kabul was opened by the mujahideen and I saw that the war was over and ended up staying in the U.S."

The federal government's own records show that Aulaqi was far more closely affiliated with al-Qaeda than the bureau has indicated. A 2009 New York Police Department (NYPD) special analysis report on Aulaqi reported that from 1998 to 1999, Aulaqi served as the vice

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president for the Charitable Society for Social Welfare, which federal prosecutors have described as “a front organization... used to support al-Qaeda...”

The NYPD report also notes that from 1999 to 2000, the FBI investigated Aulaqi for “fundraising links to Hamas and al-Qaeda” and found that Aulaqi met with “an associate of Omar Abdel Rahman,” the “blind sheik,” who is currently serving a life sentence for terrorist activities associated with the 1993 World Trade Center attack that killed six people. According to Schmidt’s February 2008 article, “Law enforcement sources now say that agent was Ziyad Khaleel, who the government has previously said purchased a satellite phone and batteries for bin Laden in the 1990s. Khaleel was the U.S. fundraiser for Islamic American Relief Agency, a charity the U.S. Treasury has designated a financier of bin Laden and which listed Aulaqi’s charity as its Yemeni partner.”

The Webster Commission report also explicitly notes that Aulaqi was twice under investigation by the FBI prior to his reemergence in Yemen: once by SDFO in the late 1990s and again – under full investigation by WFO – from 2001 to 2003. These two investigations demonstrate that, as early as 14 years ago, the FBI considered Aulaqi to be a significant concern.

The NYPD report also indicates that in 2002 the federal government added Aulaqi to the Terror Watchlist, which coincidentally is managed by the FBI. Again, this designation should certainly demonstrate that the both bureau and the entire Intelligence Community, in fact, considered Aulaqi to be of serious concern as early as 2002.

It is also worth noting that around 2006, prior to his arrest in Yemen, Aulaqi was invited to give lectures at the Yemini university run by Abdul al-Zindani, “designated” a terrorist in 2004 by the U.S.

This record indicates that Aulaqi has long been viewed by both the FBI and the Intelligence Community as a more significant threat than the mere “propagandist” than Mr. Giuliano stated. Given this public information demonstrating Aulaqi’s long history with al-Qaeda-affiliated groups and multiple bureau investigations, please confirm for the record whether the bureau viewed Aulaqi only as “propagandist” with a “moderate tone” as late as 2008, or in fact regarded him as a more complex and substantial threat than Mr. Giuliano described?

4. Statement on Aulaqi as confidential informant for the FBI:

I asked Mr. Giuliano whether Aulaqi or Hasan had ever served as a confidential informant for the FBI, given that the Webster Commission report noted that the SD officers suspected this based on WFO’s failure to further investigate Hasan. Mr. Giuliano definitively responded, “No, sir.”

However, Aulaqi’s own words could potentially indicate otherwise. In his final column for *Inspire*, Aulaqi wrote: “I was visited by two men who introduced themselves as officials with

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the US government (they did not specify which government organization they belonged to) and that they are interested in my cooperation with them. When I asked what cooperation did they expect, they responded by saying that they are interested in having me liaise with them concerning the Muslim community in San Diego.”

Although Mr. Giuliano testified that neither Aulaqi nor Hasan ever served as a confidential informant for the FBI, in light of Aulaqi’s own comments, I would like you to provide for the record whether the FBI or other federal agencies ever approached, cultivated or targeted Aulaqi or Hasan to be potential confidential informants. I believe this additional information would help reconcile Aulaqi’s comments with the bureau’s actions – and perhaps clarify why the FBI was reluctant to take more aggressive investigative actions with regard to Aulaqi.

5. Statement on Aulaqi’s relationship with 9/11 hijackers:

I asked Mr. Giuliano about the FBI’s understanding of Aulaqi’s relationship with the 9/11 hijackers. I wanted to know whether the bureau’s view on Aulaqi’s connection to the 9/11 plot might have influenced its actions in 2009.

In response to my question, Mr. Giuliano stated, “We were never able to obtain a stitch of evidence that shows Aulaqi knew beforehand about 9/11 or supported the 9/11 hijackers.” However, the public record shows that there were certainly a number of signs that show Aulaqi may have been closer to the 9/11 plot than originally believed. Consider the following:

- The 9/11 Commission report noted that, “Some [FBI] agents suspect that [Aulaqi] may have tasked Rababah to help [9/11 hijackers] Hamzi and Hanjour. We share that suspicion, given the remarkable coincidence of [Aulaqi]’s prior relationship with Hamzi.”
- Last year House Homeland Security Committee Chairman Peter King sent you and Secretary Napolitano the enclosed letter detailing other known links between Aulaqi and the 9/11 plot. This information certainly adds to the 9/11 Commission’s suspicions about Aulaqi’s role in a possible domestic support network for the hijackers.
- Former Senator Bob Graham, a past chairman of the Senate intelligence committee, wrote in his 2004 book that, “Some believe that Aulaqi was the first person since the [al Qaeda] summit meeting in Malaysia with whom al-Mihdhar and al-Hazmi shared their terrorist intentions and plans.”
- The 2009 NYPD report on Aulaqi also noted that, “Witnesses claim closed door meetings between [Aulaqi and Hamzi and Mihdhar] were common.” It also reports that following 9/11, “German police found a phone number for the Dar al-Hijrah mosque [where Aulaqi served as imam at the time] in the apartment of Ramzi Binalshibh, a 9/11 co-conspirator.”

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- In 2010 the *New York Times* reported, "One day in August 2001, Mr. [Aulaqi] knocked at the door of Mr. Higgle, his neighbor, to say goodbye. He had moved the previous year to Virginia, becoming imam at the far bigger Dar al-Hijrah mosque, and he had returned to pick up a few things he had left behind. As Mr. Higgle tells it, he told the imam to stop by if he was ever in the area — and got a strange response. 'He said, 'I don't think you'll be seeing me. I won't be coming back to San Diego again. Later on you'll find out why,'" Mr. Higgle said. The next month, when Al Qaeda attacked New York and Washington, Mr. Higgle remembered the exchange and was shaken, convinced that his friendly neighbor had some advance warning of the Sept. 11 attacks."

Despite these very serious connections to the 9/11 hijackers and suspicious comments, Mr. Giuliani testified, "We were never able to obtain a stitch of evidence that shows Aulaqi knew before hand about 9/11 or supported the 9/11 hijackers."

Please confirm for the record that Mr. Giuliani's statement that the FBI was "never able to obtain a stitch of evidence that shows Aulaqi knew beforehand about 9/11 or supported the 9/11 hijackers" accurately reflects the FBI's position?

Also, please confirm for the record whether Mr. Giuliani's characterization correctly represents the FBI's understanding of Aulaqi's connection to the 9/11 plot today, especially in light of any information that may have been learned from documents seized during the raid on Osama bin Laden's compound in May 2011?

6. Statement on Aulaqi's 2002 return to the United States:

As you know, for several years I have been pressing the FBI for a full accounting of why Aulaqi was abruptly released from custody upon his return to the U.S. in October 2002. I have not yet received an unclassified explanation.

Following Aulaqi's abrupt departure from the U.S. in early 2002, the State Department became aware of Aulaqi's fraudulent Social Security and passport statements, and the warrant for his arrest was approved. However, Fox News and others have reported that on October 9, 2002, the U.S. Attorney's office in Colorado abruptly and uncharacteristically submitted a motion to dismiss its complaint and vacate the outstanding arrest warrant against Aulaqi.

On the same day, Aulaqi was reportedly the subject of a classified FBI Electronic Communication (EC) memo. At that same time, Aulaqi was en route back to the U.S. after months living abroad but was detained by U.S. customs agents upon his arrival at Kennedy Airport in New York City.

However, following his detention at Kennedy early on the morning of October 10, 2002, Aulaqi was reportedly ordered to be released by U.S. customs agents after having been detained on an outstanding warrant, according to the Fox News report. This is particularly questionable given the time of these events. The Colorado U.S. Attorney's motion to dismiss the warrant was not approved until October 11, 2002 -- the day after Aulaqi was inexplicably released into the U.S. To date, this action and the timeline of these events have never been adequately explained.

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Had Aulaqi been arrested and tried in 2002, there is a chance that his rise as a radicalizer and terrorist operative over the last decade might have been prevented. While there may have been a reasonable argument for allowing him into the U.S. at the time the decision was made in October 2002, the FBI has, thus far, failed to publicly explain its rationale and its role. More troubling, the documents surrounding the release of Aulaqi do not match the bureau's public statements on this incident.

Given the key role that Aulaqi played in the radicalization of Maj. Hasan, and 13 innocent individuals who died at Ft. Hood as a result of his radicalization, I asked Mr. Giuliano to provide some explanation for this landmark October 2002 incident. While the full summary of our dialogue may be found in the committee record, I want to note several noteworthy comments made by Mr. Giuliano on this topic during the hearing that may or may not contradict the FBI's official position on this incident.

Mr. Giuliano testified, "I assure you, the bureau, if anything at that point [in October 2002], would have, if we could have incarcerated [Aulaqi], we would have." He also told the committee, "We knew [Aulaqi] was coming in before [his flight arrived]..."

The unclassified version of the Webster Commission report confirmed that around 2001, "WFO opened a full investigation" on Aulaqi, and it remained open until May 2003, after Aulaqi again fled the U.S. for the U.K. and, later, Yemen.

As noted above, NYPD reported that Aulaqi was placed on the federal government's Terror Watchlist in Summer 2002. Please explain why and how Aulaqi was permitted to board a flight to the U.S. in October 2002 if he was already included on the watchlist?

Additionally, if, as Mr. Giuliano testified, the FBI "knew [Aulaqi] was coming in" before he landed at JFK, what information was communicated to the U.S. attorney's office that would set off this strange series of events early in the morning of October 10? Please provide for the record the full series of communications between the FBI and the U.S. attorney's office and the customs office?

During the hearing, I raised the question of whether the FBI requested that Aulaqi be allowed into the country, without detention for the outstanding warrant, due to a parallel investigation regarding Aulaqi's former colleague al Timimi, a radical imam who was recruiting American Muslims to terrorism. Notably, the Timimi case was being led by the same WFO agent who called the U.S. attorney's office and customs on the morning of October 10. Did WFO want Aulaqi released to assist in its investigation of Timimi?

Public records demonstrate a nexus between these cases. According to Schmidt's article, after flying to Washington on October 10, Aulaqi visited Timimi. Timimi's own attorney in a court filing wrote, "Aulaqi attempted to get al Timimi to discuss issues related to the recruitment of young Muslims," for jihad. "Timimi was sentenced in 2005 to life in prison for inciting young Muslims to go to Afghanistan after 9/11 and to wage war against the United States.

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Eleven of his followers were convicted of charges including weapons violations and aiding a terrorist organization."

According to a November 30, 2009 ABC News article titled "How Anwar [Aulaqi] Got Away:" "The decision to cancel [Aulaqi]'s arrest warrant outraged members of a Joint Terrorism Task Force in San Diego, which had been monitoring the imam. 'This was a missed opportunity to get this guy under wraps so we could look at him under a microscope,' said a former agent with the Joint Terrorism Task Force (JTTF), who asked not to be named. 'He couldn't cause any harm from a prison cell.'"

The timing and rationale for these decisions simply don't add up. Andrew McCarthy, the former assistant U.S. attorney who prosecuted the blind sheik, recently wrote, "To begin with, the warrant had not been 'pulled back' at the time of [Aulaqi]'s detention at JFK. The prosecutor and the FBI may have made an application for dismissal from the court, but not such application had been granted. The warrant was still in effect. It was not dismissed by a judge until later that day, at the earliest. Of course, had the warrant actually been vacated at the time of [Aulaqi]'s arrival, as the government has been claiming, it would almost certainly have been withdrawn from the Customs database. And if, as the government claims, the FBI told Customs the warrant had been 'pulled,' the protocol would have been for Customs to ask for, and the FBI to supply, easily accessible paperwork showing dismissal of the warrant by the court. There was no such paperwork because the warrant had not been dismissed. Customs appears to have released [Aulaqi] based not on a court dismissal but on the FBI's say-so."

McCarthy continued: "When [Aulaqi] was detained at JFK airport on October 10, 2002, there was a live warrant for his arrest and every valid reason to press ahead with the case against him. If, down the road, a defense lawyer thought he could make the 'correct the record' gambit fly, the prosecutor could have opposed that in court – that's what prosecutors do. There was no reason to dismiss the case at that point."

To that point, Mr. Giuliani testified to the committee that the FBI knew Aulaqi would be arriving in the U.S. – and more importantly – told me, "I assure you, the bureau, if anything at that point, would have, if we could have incarcerated Aulaqi, we would have."

Please confirm for the record whether the FBI did everything in its power to incarcerate Aulaqi on October 10, 2002? Specifically, did the WFO agent or others ask the customs office and/or the U.S. attorney's office to use the outstanding warrant to detain Aulaqi further, as Mr. Giuliani asserted that the FBI would have wanted? Or did the FBI ask the other agencies involved to stand down and withdraw the warrant to allow Aulaqi in the country for the purpose of further investigation regarding Timimi or other suspects?

I am asking you to provide the committee with a detailed unclassified accounting of the FBI's actions in October 2002 with regard to Aulaqi. Given that I have been asking for this information since 2010, I believe it is long overdue. I also request that this information be provided to my colleague, Rep. Fattah, as well as House Homeland Security chairman Rep. Peter King, House Intelligence Committee chairman Rep. Mike Rogers and ranking member, Dutch

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Ruppersberger, Senate Commerce-Justice Science Appropriations subcommittee chairman Sen. Barbara Mikulski and ranking member Sen. Kat Bailey Hutchison, Senate Homeland Security chairman Sen. Joe Lieberman and ranking member Sen. Susan Collins, and Senate Intelligence chairman Sen. Diane Feinstein and ranking member Saxby Chambliss.

Finally, I remain concerned that the Justice Department has never fully explained why it failed to use its authorities under the Patriot Act and other anti-terror statutes to investigate and prosecute Hasan, especially given his communications with Aulaqi, who is the ultimate terrorist given his connections to the Christmas Day attempted bombing and other plots. This connection is noteworthy because the president authorized the drone strike that targeted and killed Aulaqi last year. Yet, these important anti-terror investigative tools were provided to the FBI and Justice Department for cases exactly like the Fort Hood attack, but a decision was made in the department not to exercise these authorities. Can you please explain to the committee why this decision was made, and whether the department sacrificed any opportunities to gather additional evidence in choosing not to use these tools?

I hope you can understand why I was disappointed in a number of the statements made to the subcommittee during this hearing. That is why I wanted to give you the opportunity to correct the record. I expect that you will provide the committee, by September 15, with the necessary information to clarify some of these misleading, inaccurate or incomplete statements. I look forward to your response.

I sincerely appreciate your efforts – and those of the hard-working agents, analysts and staff members of the FBI – to keep the country safe.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

1/17/14

1/17/14

PETER T. KING, NEW YORK
CHAIRMAN



BENJAMIN G. THOMPSON, MISSISSIPPI
RANKING MEMBER

One Hundred Twelfth Congress
U.S. House of Representatives
Committee on Homeland Security
Washington, DC 20515

October 25, 2011

The Honorable Janet Napolitano
Secretary
Department of Homeland Security
Washington, D.C. 20528

The Honorable Eric H. Holder, Jr.
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Secretary Napolitano and Attorney General Holder:

The Committee on Homeland Security is investigating the role of the late Anwar al-Awlaki and his associates in the September 11, 2001 attacks. In furtherance of that investigation, I write to request that the Departments of Homeland Security and Justice not seek to deport Daoud Chehazeh, an associate of Awlaki and two of the 9/11 hijackers, without first questioning Chehazeh -- under oath -- about what role he, Awlaki and their associate Eyad al-Rababah played in the 9/11 attacks.

It is well-known that Awlaki met 9/11 hijackers Khalid al-Mihdhar, Hani Hanjour and Nawaf al-Hazmi in California and Virginia in 2000 and 2001, and with Hazmi in both locations. Awlaki fled the US in 2002.

Awlaki was later implicated in several attempted terror attacks on the Homeland, and connected to fatal attacks in Little Rock, Arkansas and Fort Hood, Texas in 2009. At the time of his death, Awlaki served as al-Qaeda in the Arabian Peninsula's external operations coordinator, and was described by senior Government officials as a terrorist at least as dangerous as Usama bin Laden. It is not yet known if Awlaki was an al-Qaeda member in 2000-01, or if he was radicalized to terrorism sometime between then, and his public emergence as an al-Qaeda leader in 2009.

It is also known that hijackers Hanjour and Hazmi met in 2001 with a contact of Awlaki's, Palestinian identity documents procurer Eyad al-Rababah. As discussed by the Report of the National Commission on Terrorist Attacks upon the United States, Rababah helped Hanjour and Hazmi find apartments in New Jersey and Virginia, and accompanied hijackers Hanjour, Hazmi, Ahmed al-Ghundi and Majed Moqed on a trip to Connecticut. Rababah knew the hijackers were undertaking flight training. Rababah was deported to Jordan in 2002.

According to the 9/11 Commission, "Some FBI investigators doubt Rababah's story. Some agents suspect that Awlaki may have tasked Rababah to help Hazmi and Hanjour. We share that suspicion, given the remarkable coincidence of Awlaki's prior relationship with Hazmi."

What is not as well known, and may not have been shared with either the Joint Inquiry into the Terrorist Attacks of September 11, 2001 by the House and Senate Intelligence Committees, or the 9/11 Commission, is the following. I am reliably informed that:

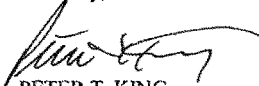
- In March 2001, Rababah met a Syrian procurer of Saudi visas, Daoud Chehazeh.
- Chehazeh informed Rababah that they must move to the Boston or Washington areas (the points of origin for three of the hijacked flights).
- In April 2001, Chehazeh and Rababah moved to Virginia together, with Rababah paying the rent for both men.
- Chehazeh directed Rababah to Anwar al-Awlaki at the Dar al-Hijrah mosque in Virginia to find "work."
- Awlaki then directed hijackers Hanjour and Hazmi to Rababah.
- Chehazeh described the hijackers to Rababah as "special police" and "important" men.
- A reliable eyewitness states that Rababah frequently visited the same New Jersey library computer facility with Hanjour and Hazmi where Hanjour bought his tickets for 9/11.
- Documentary evidence suggests that Chehazeh was likely aware of Hanjour's flight training past the World Trade Center.
- Chehazeh lives in New Jersey, is the subject of an asylum proceeding currently under appellate review (*Daoud Chehazeh v. Attorney General of the United States, et al.*, Case No. 10-2995), and has never been questioned under oath about his role in the attacks.

In addition to the facts already provided to the Joint Inquiry and the 9/11 Commission, this additional evidence suggests that Awlaki, Chehazeh and Rababah may have facilitated the 9/11 attacks, and perhaps even wittingly facilitated these attacks.

The Committee on Homeland Security is committed to determining what role these men, and any other at-large Awlaki associates, may have played in the worst mass murder in US history. I request that the Departments of Homeland Security and Justice not seek to deport Chehazeh without first questioning Chehazeh, under oath, about what role he, Awlaki and their associate Eyad al-Rabah may have played in the 9/11 attacks.

If you have any questions regarding this letter, please contact Kevin Carroll or Joseph Herbert on my staff at 202-226-8417.

Sincerely,



PETER T. KING
Chairman

CHRONOLOGY

1971	Born in New Mexico to Yemeni parents. He holds U.S. and Yemeni citizenship.
1975-1977	Awlaki's father, Nasser al-Awlaki, works at the University of Minnesota
1978	Family moves back to Yemen
1978	Nasser al-Awlaki becomes Agriculture Minister and a university president
1991	Begins attending Colorado State University on a F-1 student visa
1995 (est.)	Obtains a B.S. in Civil Engineering from Colorado State University
	Becomes imam in Fort Collins, Colorado
1995-1996 (est.)	Moves to San Diego to obtain M.A. in Education Leadership from San Diego State University
	Becomes imam at Masjid Ar-Ribat al-Islami mosque in San Diego.
1996-1997	Arrested twice in San Diego for soliciting prostitutes
1998-1999	Serves as Vice President for Charitable Society for Social Welfare (CSSW), founded by Abdul Majeed al-Zindani. Federal prosecutors have referred to CSSW as "a front organization...used to support al-Qaeda...."
	FBI investigates Awlaki for fundraising links to HAMAS and Al-Qaeda.
	Awlaki is connected to Ziyad Khaleel, a fundraiser for the Islamic American Relief Agency, a charity designated as a terrorism-financier and a partner-charity with CSSW.
Jun. 1999-2000	Awlaki reportedly meets with an associate of Omar Abdel Rahman FBI lacks evidence to arrest; case closed.
Early 2000	Khalid al-Mihdhar and Nawaf al-Hazmi, two 9/11 hijackers, visit the Awlaki's San Diego mosque. Witnesses claim closed door meetings between them were common.
Feb. 4, 2000	Phone calls are made from Awlaki's phone to Omar Bayoumi's phone (Bayoumi assisted Al-Mihdhar and al-Hazmi in finding a San Diego apartment)
	Begins Ph.D. at George Washington Univ. for Human Resource Development
Jan. 2001	Becomes imam at Dar al-Hijrah Mosque in Falls Church, Virginia. Ft Hood shooter, Nidal Malik Hasan attends the sermons.
April 4, 2001	Al-Hanjour and Hazmi move to Falls Church. Three 9/11 hijackers – al-Mihdhar, al-Hazmi, and al-Hanjour –attend Awlaki's sermons.
Sept. 11, 2001	9/11 Attacks
Sept. 17, 2001	Awlaki at first condemns the 9/11 attacks, then suggests Israeli culpability
Post 9/11	German police find phone number for the Dar al-Hijrah mosque in the apartment of Ramzi Binalshibh, a 9/11 co-conspirator

2001-2002 (est.)	FBI observes Awlaki taking prostitutes from DC to Virginia; contemplates use of Mann Act, a federal law prohibiting transporting prostitutes across state lines
March 2002	Awlaki leaves United States for Yemen
Summer 2002	Awlaki becomes target of JTTF investigation after the subject of an investigation sends him money; Awlaki's name placed on terror watch list
Early Oct. 2002	Federal judge issues arrest warrant for Awlaki for passport fraud and making a false statement. [Awlaki had attended college on a foreign-student visa falsely claiming he was born in Yemen, not the U.S.]
Oct. 9, 2002	Colorado U.S. Attorney's Office in Denver withdraws the arrest warrant
Oct. 10, 2002	Awlaki arrives at JFK airport from Riyadh (potential connection from Yemen). He is briefly detained, then released due to withdrawn warrant
Oct. 2002	Federal court papers assert that Awlaki visited Ali al-Timimi , who is now serving a life sentence for inciting followers to fight on behalf of the Taliban, to ask how to recruit members for "violent jihad."
Fall 2002	Awlaki moves to Britain; develops lectures and audiotapes for the internet
2004	Moves to Yemen permanently
2006 (est.)	Gives a few lectures at al-Iman University, run by al-Zindani, who was designated foreign terrorist by the U.S. government in 2004.
Aug. 31, 2006	Awlaki arrested in Yemen ; claims he was questioned by FBI agents
Dec. 12, 2007	Awlaki released from prison.
Dec. 17, 2008	Awlaki: Received the first email from Ft Hood shooting, Nidal Hasan
Late Dec. 2008	East London Mosque controversially hosts an Awlaki lecture via videolink
March 2009	Awlaki's parents say he has been missing since March 2009. Suspected of hiding in Mareb or Shabwah governorates. [Family originally from Shabwah].
Aug. 2009	Awlaki banned by London authorities from speaking via videolink to a fundraiser event for Guantanamo detainees
Nov. 5, 2009	Ft. Hood Shooting
Nov. 2009	Awlaki's website removed from WordPress

Note: al-Awlaki has a wife and five children (three boys and two girls). They are currently residing with his father, Nasser.

AL-AWLAKI'S INFLUENCE ON TERRORIST ACTORS

Awlaki's lectures are strongly pro-jihad and supportive of al-Qaeda and its affiliates. In January of this year, he released an article entitled, "44 Ways to Support Jihad;" in July, he praised the efforts of al-Qaeda after militants in Yemen clashed with the government; and, on his blog, he has praised al-Shabaab, who has pledged allegiance to the al-Qaeda cause. In the following case studies, Awlaki is suspected of being a spiritual advisor to operatives, recruiters, and homegrown terrorists.



U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535-0001

October 4, 2012

The Honorable Frank R. Wolf
Chairman
Subcommittee on Commerce, Justice,
Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for spending time with Deputy Director Sean Joyce on September 24, 2012, to discuss the issues raised in your August 15, 2012, letter. I am writing to provide you with additional information about those issues.

1. Statement on Webster Commission findings on "political correctness"

The Webster Report concluded that the FBI's decision not to interview Nidal Hasan was flawed and identified two bases for that decision: the desire to protect the integrity of the Aulaqi investigation and the assessment that an interview of Hasan would not constitute the least-intrusive investigative technique. The Webster Report did not find that "political correctness" was responsible for the FBI's decision. The report does recount a San Diego Office Task Force Officer (TFO) paraphrasing a Washington Field Office (WFO) TFO that the interview issue was "politically sensitive." We understand that the Webster Commission could not determine whether the WFO TFO made the statement because he did not recall making it. In any event, the Webster Commission did not find that "political sensitivity" contributed to the decision not to interview Hasan.

2. Statement on Hasan and Aulaqi's relationship

The FBI does not know Aulaqi and Hasan to have met in Virginia. We are, however, aware of reports of the two men meeting. One example is an email sent by Hasan to Aulaqi on February 16, 2009, in which Hasan claimed that he had met Aulaqi in Virginia: "We met briefly a very long time ago when you [(Aulaqi)] were the Imam at Dar al Hijra. I doubt you remember me." It is possible that Hasan, or any of the regular

The Honorable Frank R. Wolf

attendees of the Dar al-Hijra mosque, met Aulaqi during Aulaqi's January 2001 to early 2002 tenure as imam, but the FBI's investigation has been unable to confirm any reports of their meeting and has also developed information refuting some reports.

3. Statement on FBI's perception of full nature of Aulaqi threat

National Security Branch Executive Assistant Director (EAD) Mark Giuliano testified about the evolution of Aulaqi from an influential propagandist to an operational terrorist, as well as the difference between the public face Aulaqi sometimes projected and the information known to the FBI and its Intelligence Community partners. As the Webster Report indicates, there are a variety of reports and perspectives on the potential threat posed by Aulaqi at different points in time.

Rather, we assessed that the primary Aulaqi threat in 2008 was his potential ability to radicalize Western and/or English-speaking individuals.

4. Statement on Aulaqi as confidential informant for the FBI

Neither Aulaqi nor Hasan served as a confidential human source for the FBI, and the FBI did not approach, cultivate, or target either man for that purpose.

5. Statement on Aulaqi's relationship with 9/11 hijackers

The FBI has not developed evidence that Aulaqi had advance knowledge of or involvement in the 9/11 attacks, nor has the FBI developed evidence that he knowingly provided support to any hijacker in furtherance of that plot.

6. Statement on Aulaqi's 2002 return to the United States

By letter dated August 20, 2010, the FBI provided you with an accounting of the circumstances leading to the dismissal of a passport fraud charge against Aulaqi in October 2002. Included with that response was the unclassified Department of Justice (DOJ) statement explaining the circumstances of its decision to dismiss the charge. I have enclosed both the letter and the DOJ statement here. In short, prior to Aulaqi's October 10, 2002, arrival in the United States, DOJ had concluded that "there was no legal basis to bring a passport fraud prosecution" against Aulaqi and that the complaint should be dismissed and the arrest warrant withdrawn.

In general, persons are not prohibited from flying unless they are placed on a sub-list within the terrorist watchlist known as the No Fly list.

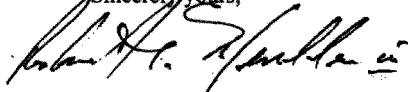
The Honorable Frank R. Wolf

[REDACTED]

EAD Giuliano attempted to answer questions about these issues as accurately as possible in an open setting, consistent with his responsibility to protect classified national security information. I believe that the questions in your August 15 letter could have been posed without characterizing his testimony as "potentially misleading." Please understand that such statements have a significant impact on persons who have spent their lives serving their country with distinction and sacrifice. EAD Giuliano is just such a person, one of our best.

Thank you for the subcommittee's continued support of the FBI and its mission.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Robert S. Mueller, III", with a stylized flourish at the end.

Robert S. Mueller, III
Director

Enclosures

Mr. WOLF. But I think Judge Carter, really speaks for a lot of concerns that people have had. You know, I was the author of the National Commission on Terror in 1998, and there were a lot of recommendations with the Bremer Commission. Men and women up here on both sides of the aisle didn't think there was any terrorism involved, and some people said, why are you doing this? You found that the Bush administration and then the Clinton administration missed some things. What Judge Carter wants to make sure on the committee is that it is not missed as we go off into the future.

COMMUNITY OUTREACH

Were WFO agents or supervisors rated on their development of relationships with and outreach to outside groups?

Mr. GIULIANO. Can you repeat that, sir?

Mr. WOLF. Were the Washington field office agents or supervisors rated on their development of relationships with and to outreach to Muslim groups? I have had some agents tell me that they were rated on their outreach.

Mr. GIULIANO. The community outreach personnel maybe, sir, but as a regular part of their performance appraisal, I don't know how much that would weigh into an investigator's day-in-and-day-out PAR.

Mr. WOLF. So it could be in the rating?

Mr. GIULIANO. I don't know the answer to that question, sir.

Mr. WOLF. Could you then get it, submit it for the record?

Mr. GIULIANO. Sure, absolutely.

[The information follows:]

PERFORMANCE APPRAISAL RATING FACTORS

The details of the Performance Appraisal Rating factors are classified and will be provided separately in a classified setting.

Mr. WOLF. Was Awlaki or Hasan ever a confidential informant for the FBI, as the San Diego office appears to have suspected?

Mr. GIULIANO. No, sir.

COUNTERING VIOLENT EXTREMISTS OFFICE

Mr. WOLF. We understand that the FBI has in the last year established a Countering Violent Extremists, CVE, Office within the National Security Branch. This was done without submitting the reprogramming notification required by section 505 of the appropriations bill.

What does this office do, and how would the work of the office inform the handling of cases like the Hasan lead where political correctness about confronting extremism could have played a role?

Mr. GIULIANO. Sir, it is actually a very, very small office.

Mr. WOLF. How many are in the office?

Mr. GIULIANO. There is one GS-15 and maybe less than a handful of analysts. It came out of a requirement from the White House for all of us, the Department of Homeland Security, us, NCTC, to try to get to the root, going back to Mr. Carter's point, as to home-grown violent extremism, but going back and trying to figure out what is causing it and whether we can get on the front end of it rather than being on the back end of it. In other words, is there

a way to counter it? Can we learn from what we, and the FBI in particular, which is what this office is set up to do—can we learn from our investigations, can we learn from those that have been radicalized by somebody like Awlaki or somebody else and push that back in some way, shape or form into the community so that we can prevent it from happening in the meantime? And that is the purpose of this very small office that falls directly under the National Security Branch.

MOTIVES OF TERRORIST PLOTS

Mr. WOLF. The Webster report includes on page 11 a list of 13 violent plots foiled by the JTTFs. Are any of these 13 incidents something other than violent Islamist extremism?

Mr. GIULIANO. I am sorry, sir, what page are you on?

Mr. WOLF. Page 11, a list of 13 violent plots foiled by the JTTFs.

Mr. GIULIANO. Many of them are homegrown violent extremism, not all of them.

Mr. WOLF. Were any of them not Islamic extremism?

Mr. GIULIANO. All of them had some kind of ties to Islamic extremism. So I guess my point was, and maybe I misspoke, they weren't all considered homegrown violent extremists, so I stand corrected.

COUNTERING VIOLENT EXTREMISTS OFFICE

Mr. WOLF. Okay. Based on the report, it appears that the most urgent tasks the CVE office could pursue is to advance a culture within the FBI of prioritizing timely and thorough pursuit of leads, and reassure employees that legitimate and aggressive pursuits of leads suggesting a violent Islamic extremism will not be perceived as politically correct and will not be detrimental to their careers. Is that what the CVE office is doing?

Mr. GIULIANO. The CVE office is an office that I think will help—and hopefully with the other CVE offices—help our investigators better understand what causes radicalization and what indicators there are of those that are being radicalized. And again, I go back to the point that it is not good enough just to understand those that are radicalized, it takes more, and there are many people that are radicalized out there that never do what Hasan did. We need to understand what causes it, we need to understand those that are radicalized, and we need to be able to understand those nodes of mobilization so that we can prevent another Fort Hood.

Mr. WOLF. Can you have the person who heads the office come up and see me?

Mr. GIULIANO. Sure.

Mr. WOLF. Okay, great. Just have them call the committee and come on by.

DIVISION OF AUTHORITY BETWEEN HEADQUARTERS AND FIELD OFFICES

The Commission report recommends the implementation of a written policy on the division of authority among the FBI's headquarters and field entities. The report suggests the FBI has already done that. Is that accurate?

Mr. GIULIANO. Yes, sir, it is.

Mr. WOLF. Can you provide this written policy to the committee?

Mr. GIULIANO. I will take that back, sir. I don't see why we can't. It is classified, so we will have to just—

Mr. WOLF. One of the major findings is the lack of clarity over the ownership of the Hasan lead, where San Diego and the Washington field office disagreed over the handling and resolution of the lead. Has it been now formalized, the process for resolving such disagreements? Is there a formal process; this process kicks in because something like the fact pattern that happened here?

Mr. GIULIANO. We did put out written guidance on that, which will go into our corporate policy the next time it comes around. So it is on a cyclical basis.

[CLERK'S NOTE.—The Bureau provided classified documents for the Committee's review which address the Bureau's division of authority and responsibilities including the division of authority among headquarters, field and overseas offices regarding terrorism investigations.]

Mr. WOLF. One of the most troubling revelations in the report is the length of time that was taken to act on the Hasan lead. The San Diego field office sent the lead to WFO on January 7, 2009. This lead was not read until February 25th, at which time a supervisory special agent assigned the lead to a task force officer. That task force officer did not read the lead until May 27th. A cold, snowy day in January, in May the azaleas are out, so a good bit of time has gone by. During the time from January 7 to May 27, there were numerous contacts between Hasan and Awlaki. Is the time taken to act on this lead standard for a lead of this type or priority?

Mr. GIULIANO. Sir, it would have been then, but not now, not under the new guidelines.

Mr. WOLF. Is there any indication that this lead was categorized or given a priority incorrect—that was incorrect at that time?

Mr. GIULIANO. Not at the time.

DEADLINES FOR ACTION ON LEADS

Mr. WOLF. Okay. Is the delay in acting on the lead, could it have been related to workload of the FBI Counterterrorism Squad, that they were overworked, had too much work?

Mr. GIULIANO. Sir, it could have been. I think the squad was working on the inauguration and then subsequently the shooting at the Holocaust Museum. But, again, regardless of workload, it should have been covered sooner.

Mr. WOLF. And so what does the FBI now believe are reasonable deadlines?

Mr. GIULIANO. For an immediate lead within 24 hours; priority lead within 7 days; and these leads are now from the second it is sent, it doesn't matter when it is assigned. Sixty days from the time San Diego would have sent it to the time it is completely covered.

OBJECTIVELY INVESTIGATING LEADS

Mr. WOLF. I think you have answered this, but you may want to elaborate, because it is the only time I think you are differing

with Judge Webster. In this case it appears WFO assigned the Hasan lead to the task force officer from the Defense Department specifically because Hasan was in the U.S. military. The report recommends that the FBI should adopt a policy whereby no task force officer shall be assigned a lead for an assessment or investigation of an employee of his or her home agency.

Does Judge Webster believe that is because it is very difficult for someone in a particular agency to investigate its own people, and therefore it is easier to have somebody outside? You make a pretty good point. I have talked to some agents, and I think for the record the Members should know they make the same point that you made.

Is there a blend, because it would be very difficult for somebody in a certain group to then investigate the people in the group, because we all know each other, so to have an objective person to come from outside. But could you elaborate a little bit more?

Mr. GIULIANO. Sir, again, and I think you hit the point very well, that is the one area where we are still kind of wrestling with it. It was assigned, and if you go back to the San Diego lead, they consulted with their DOD people on the JTTF for guidance on records checks, on how to get the records back in a timely fashion, and then subsequently assigned to DOD personnel in the Washington field office.

The Webster Commission felt that there is a potential for bias from those investigating within their own organization. Our argument is those people are, by nature, people who investigate in their own organization. They are investigators. So if you look at the JTTF and their composition, whether it is Defense Criminal Investigative Service, or NCIS, or Army/Air Force OSI, or Army CID, that is what they do, and they are good at it, and they are value added to the task force. So we think there needs to be a blend, with maybe some more oversight from an FBI supervisor on those investigations, but we still believe they are the best people to navigate through the nuances of DOD, for instance.

Mr. WOLF. Now, I don't know, Mr. Carter may remember this. Congressman Carter, I don't know if you do. I watched I believe the Chief of Staff of the Army outside. Do you recall what he said at that time? I want to make sure I am accurate. Will you just say—

Mr. CARTER. I can't quote it exactly, but it was something along the line, "I certainly hope this doesn't disturb our Islamic outreach program."

Mr. WOLF. And so if you are a major or a captain, and the Chief of Staff of the Army says that, and, you know, you went to West Point, you want a career, that can be tough. And so I think it is one you are going to have to kind of nail down, when the top person in the organization says that. I have talked to others, and they have all said pretty much what you said, but I think there has to be some mechanism to catch it in case you have that problem.

Mr. GIULIANO. Yes, sir.

FBI BUDGET

Mr. WOLF. The fiscal year 2013 budget request did not include any increases for the national security program. Within the na-

tional security portfolio, what is the priority you would give to increasing the number of intelligence analysts, and are you seeking such an increase in future budgets?

Mr. GIULIANO. Sir, I would have to go back, and there has been many machinations of the budget, and I don't know where this last billet sits. Our intelligence analysts are absolutely critical to what we do, and I would say there is probably not an SAC in the field that would say that an increase in intelligence analysts embedded in their operational shops would not help them as they move forward.

Mr. WOLF. The Commission recommends that you seek funding immediately for acquisition of new hardware for the Data Warehouse System—Electronic Data Management System. This hardware would enhance search, analysis and data management. What is the cost associated with this hardware upgrade, and do you intend to seek any programming authority to acquire such hardware during this fiscal year?

Mr. GIULIANO. Sir, I would have to get back to you on that where we are. We have made a lot of changes in our software and hardware since Judge Webster started his report; the DIVS system, Palantir, and now Sentinel online. We just need to go back and see when this recommendation was and kind of the snapshot of where we are with our IT requests, and I will get back to you on that.

[The information follows:]

The FBI does not intend to reprogram funding to acquire additional hardware or software.

Mr. WOLF. Okay. And I think if you could talk to us, clearly I think the committee would approve of the reprogramming, particularly of the high importance that Judge Webster gave it. So if you could as soon as possible have them contact the committee, I would appreciate it.

STAFF TRAINING

The report highlights the fact that the staff members in the San Diego and Washington field office were unaware of key data systems or were not trained on how to use them. Have steps been taken to correct this totally?

Mr. GIULIANO. Yes, sir, they were taken immediately afterwards.

Mr. WOLF. Okay. And data training is mandatory, as the Commission recommends?

Mr. GIULIANO. That is correct, sir.

Mr. WOLF. All task force officers will complete the training within how many days?

Mr. GIULIANO. Right now it is within 90 days.

Mr. WOLF. Ninety days. Was the recommendation 90 days or 60 days?

Mr. GIULIANO. I think it was 60 days, sir, but just with the number of people we are putting through Quantico, we are at about 90.

ADMINISTRATIVE ACTIONS

Mr. WOLF. I want to ask this last question here before I go back to Mr. Fattah and any other Members to clean up. And I think Mr. Fattah made a very good point. The purpose of the hearing is really

to find out what happens so that it never happens again. And I would like to have the opportunity to talk to the person in the Washington field office, but the Commission did not find any misconduct to warrant administrative disciplinary action, but declined to express views on whether administrative actions should be taken for performance-based reasons.

Has the FBI taken any administrative actions with regard to any FBI employees' performance of duties in relationship to this particular case?

Mr. GIULIANO. Sir, all the findings were pushed to the Inspection Division, as is normal course of action for us, and that team is reviewing it for the action and to determine whether any administrative action or any performance-related action is going to be taken.

Mr. WOLF. What is the timetable for completion of this process?

Mr. GIULIANO. I think I said between 60 and 90 days.

Mr. WOLF. Outside of the WFO task force that was given the Hasan lead, was anyone else at WFO or FBI headquarters aware of the length of time it was taking to act on this lead?

Mr. GIULIANO. Sir, there was an informational lead sent to headquarters, but they did not track the lead. Again, that has changed and would change under the new system.

Mr. WOLF. So now the management would monitor this now?

Mr. GIULIANO. Sir, it is monitored, and there are 90-day file reviews that would have caught that it had lagged. Again, though, the Commission report stated, and we concurred, that the time period is still too long.

Mr. WOLF. Okay. I am going to go to Mr. Fattah, and then Mr. Culberson and Carter if they have any final questions.

Mr. Fattah.

ARREST OF AWLAKI

Mr. FATTAH. Let me try to cover some of the details, but also get into some of the broader issues.

How many months after 9/11 does Awlaki land at JFK?

Mr. GIULIANO. That time he comes back, and he came back in 2002 a number of times, but that was October of 2002, I believe, the chairman is talking about.

Mr. FATTAH. Okay. So it is almost a year after 9/11.

Mr. GIULIANO. That is right.

Mr. FATTAH. He comes back, he is arrested, but then the warrant is withdrawn, right?

Mr. GIULIANO. He is held, and the warrant is withdrawn.

Mr. FATTAH. Right. So, I think that the chairman's interest in this has a lot of merit just to find out exactly what the circumstances were, because you would think that there would be heightened tension, that the Bush administration is focused on the fact that we have just had this attack within a year. We have a kind of a full-court press going on, but for some reason this arrest is not pursued.

AWLAKI'S RADICALIZATION

But I hear you, and this is how I want to get to the broader point, I hear you, because you have said it a number of times about Awlaki at one point and Awlaki at a different point, that he was

going through a process. So, if you looked at Timothy McVeigh at one point, and then you look at him blowing up the Oklahoma City Federal building, there is a radicalization going on, but it has not taken hold.

Now, at the time that President Obama—and the President has been commended and criticized—and his administration killed Awlaki through a drone attack, people said, well, you know, he is an American citizen and this and that. So, you know, if you could walk me through where you think he was based on the information that you have. Was he at this time, a year after 9/11, was he someone who had moved from having a set of beliefs which are protected under our Constitution to being an active enemy of our country?

Mr. GIULIANO. Sir, that is a fair question, and I will try to answer it as specifically as I can.

Awlaki changed, and he changed a lot over the years. When he went to prison in Yemen in 2006–2007, and as he came out and came back up online in early 2008, Awlaki still had somewhat of a moderate tone, but began to be more of a propagandist and began to show more radical tendencies. But we could not, and the IC did not, see him as operational or in an operational role at that time.

Mr. FATTAH. This is four years after the JFK incident.

Mr. GIULIANO. That is right.

Mr. FATTAH. He has been in prison. He seems to be becoming more radical.

Mr. GIULIANO. That is right.

Mr. FATTAH. But he is not necessarily, at least at the moment, operational.

Mr. GIULIANO. That is right. The Intelligence Community did not assess him to be operational at that point. It really comes down to where we see him where it really obviously changes, and it changed over the years. But with flight 253, and his ties into AQAP, and flight 253 coming into Detroit, and then the printer cartridge attempted bombings, clearly he was in an operational role at that time and much stronger in AQAP. If you go back to the 2000–2001 timeframe, he still right up to that time was an imam at a mosque here locally and, quite honestly, was fairly well respected.

Mr. FATTAH. Now, a year ago in September, when the President and his administration caused his demise, there were Members of the House on the floor criticizing the President for taking this action. He at that point was operational?

Mr. GIULIANO. No question, sir.

Mr. FATTAH. There is no doubt about it, right?

Mr. GIULIANO. No question whatsoever he was trying to kill American citizens, none whatsoever.

Mr. FATTAH. And therefore, it was proper for us to protect ourselves and defend ourselves at that point, right, in my judgment?

Mr. GIULIANO. In your judgment, sir.

Mr. FATTAH. I don't want to put words in your mouth.

Mr. GIULIANO. That is correct.

Mr. FATTAH. So I think that it is important to put this thing in some context. You know, this young man who walked in the movie theater and shot these people 5 years before that in high school

was a different young man. There is something that happened, right?

And so this is where we have to get into the context. If you take something out of context, it is a pretext, right? It is not the truth at that time. So the truth at this time, a year after 9/11, when the Bush administration was dealing with this question, and he was released in 2002, he was not operational at that point. He became much more radicalized, using that term, in Yemen in jail in 2006 and 2007. And then when President Obama ordered his demise in September of 2011, he was an operational figure and was an active enemy of the United States of America.

Now, then you come into the Hasan deal, which is what the Fort Hood issue is about, because Awlaki wasn't at Fort Hood. The connection of Awlaki to Fort Hood is this email or a number of emails from Hasan to Awlaki, right, and whether they should have caused a more intense effort. So Awlaki is getting thousands of emails from people who are asking him any number of things.

Mr. GIULIANO. That is correct, sir.

Mr. FATAH. Right? In fact, Hasan is asking him at one point about fairly mundane issues. But there was a reason why this could have taken a different tone if one's instincts might have taken one in that direction, and that is what this really is about. It is about the judgment call that got made, right?

Mr. GIULIANO. That is correct.

CONNECTING INFORMATION

Mr. FATAH. But he is just one of thousands of people emailing. So the first thing we are fixing is that when you have a certain circumstance where you have thousands of people interacting, that you also connect where these strings tie together, and that is being fixed by the recommendation of the Webster Commission. The Bureau agrees with that recommendation.

Mr. GIULIANO. That is correct, sir.

Mr. FATAH. And the software and everything to make that work together has been put in place. This is very important now.

So there is a tendency here to confuse national security with politics. This is not about politics. What we have to do as a committee is to focus in on the efforts that have taken place over a number of administrations, one in which he was let go, and the other in which he was sent on to his afterlife, right? But the difference is that in both cases people were acting based on the information they had at the time, and acting in the best interests, as they perceived it, of the citizens of our country.

And so I again want to thank the chairman. I agree with the chairman that we want to know a little bit more about the release and why the warrant was withdrawn. But there is no reason to look at this under any basis than this character in Colorado in the movie theater, He was, stopped for a traffic violation or something a year ago, but at that point he wasn't someone who was gathering 6,000 rounds of ammunition and automatic guns or semiautomatic guns to go into a movie theater.

So there are points along a process in which judgments are made based on the information at hand. Now, there could be different

judgments made, and I think that you agree, I know you agree, that there should have been a face-to-face interview with Hasan.

Mr. GIULIANO. That is right.

Mr. FATTAH. Now, how long had he been in the military at the time of the Fort Hood incident?

Mr. GIULIANO. I would have to go back and check on that, sir.

Mr. FATTAH. He had been there for many years, right?

Mr. GIULIANO. Many years. A number of years, that is correct.

Mr. FATTAH. Right. And so, you know, the situation as we see it today, we are looking at it in the fullness of a rearview mirror in which we have all of this information, and it is a little bit different than going at it on a current knowledge basis.

I thank the chairman, and I would be willing to sign on to his request that we get more information about the warrant being withdrawn.

Mr. GIULIANO. Yes, sir.

Mr. FATTAH. Thank you.

AWLAKI'S HISTORY

Mr. WOLF. I am going to thank you. And generally Mr. Fattah and I, we generally agree. On this one I think, you know, he may be right, he may not. My own feeling, and it is an opinion, is that Awlaki was a bad guy from the very, very beginning.

And I have talked to some of the 9/11 Commissioners. I spoke to one staff person the other day. But in the 9/11 Commission report it says with regard to Awlaki, "Another potentially significant San Diego contact for Hazmi and Mihdhar was Anwar al-Awlaki, an imam at the Rabat mosque. Born in New Mexico, and thus a U.S. citizen . . ."

Actually did you know he went to school on your taxpayer dollars? Did you know that, Mr. Giuliano? Did you know he had a scholarship from the Federal Government?

Mr. GIULIANO. I know he did have a scholarship and went to Colorado.

Mr. WOLF. He "grew up in Yemen and studied in the United States on a Yemeni Government scholarship." But he had an American scholarship, too. "We do not know how or when Hazmi or Mihdhar first met Awlaki. The operatives may even have met, or at least talked to him, the same day they moved from San Diego to San Diego. Hazmi and Mihdhar reportedly respected Awlaki as a religious figure and developed a close relationship with him."

"Awlaki left San Diego in mid-2000, and by early 2001 had relocated to Virginia. As we will discuss later, Hazmi eventually showed up at Awlaki's mosque in Virginia, an appearance that may not have been coincidental." These are the people of the 9/11 Commission. "We have been unable to learn enough about Awlaki's relationship with Hazmi and Mihdhar to reach a conclusion." And then there is more.

FBI BRIEFINGS

So, you know, in closing, if we can have the briefing with regard to the NPR report on the number in the military that you agreed with; secondly, if you have your budget people come up and tell the committee if you need the reprogramming so that you can follow

it through in that one system; thirdly, if there is anything in next year that is needed dealing with this because the CR will be put together over the August break. Fourthly, I would like to have the CVE guy come up, is it a man or a woman, whoever runs it, to come up and sit down with me. Lastly, I want to see and talk to the person at the Washington field office that made the decision.

POLITICAL CORRECTNESS

And I guess the question I would have, as I think about this, given that Washington—and Webster was really silent. I think it is important for people to know. Given the fact that Webster was silent on the political correctness aspect, did it play a role, did it not, have you gone back internally or done an internal evaluation of the people involved privately to ask them? Because what is in somebody's mind might be different than what the reality was. Maybe somebody said, I was slighted, but maybe they were slighted because the person was looking the other way. But I think it is important to ask the agents involved both in San Diego and in Washington, did anything that was going on make them reluctant to act?

And lastly, what have you done as an agency to make sure that FBI agents do not have this inhibition to move, as many of the Members have referenced, and to do something so that we can prevent the next Fort Hood or the next 9/11?

Do you want to just cover that before we end?

Mr. GIULIANO. So to answer your question, the first one, sir, all the individuals were——

Mr. WOLF. But to answer that specific question, because the Webster report doesn't really put that to rest, to ask.

Mr. GIULIANO. Right. Again, I think we just disagree on that point.

Mr. WOLF. Well, show me, then, Mr. Giuliano. Let us recess for a moment. Go to the point and show me where it says that.

Mr. GIULIANO. It doesn't, sir. I think what they did is——

Mr. WOLF. I mean, this is the report we are operating on.

Mr. GIULIANO. But I think the facts——

Mr. WOLF. Did Judge Webster call you and tell you that he said there was no political correctness involved?

Mr. GIULIANO. No, but if you look at the decision that was made and the criteria that they laid forward as to why that decision was made, I think it lays out why the task force officer made that decision, at least in the opinion of those that did the investigation by the Commission. So I believe that if they would have found it, then there is no reason for them not to put it in their report. They have no——

Mr. WOLF. But it is not in the report. They did not say clearly there was not. In fact, there is an inference that it may very well have been.

Mr. GIULIANO. Okay.

Mr. WOLF. Okay. And have you done an internal, or ask other people outside, to ask if FBI agents are feeling this great reluctance to act because my career could be over, or is there some sensitivity now that the Bureau wants them to do what they should be doing to make sure that we never have another Fort Hood?

Mr. GIULIANO. I think if you sat through any of what we call the SPS sessions that are like the CompStats that the Director holds with the executive staff of both criminal and national security and with each SAC in the field and their executives where they are held accountable for what they do every day, you would see that in his FBI, political correctness is not tolerated. He expects us to follow the letter of the law and the Constitution and to turn over every rock and every lead. So I don't believe that is the issue here, sir. I believe if the Commission would have seen it, they would have gone down that path.

Mr. WOLF. Well, maybe and maybe not.

And I guess we will end with this: You had the Assistant Director in Charge of the Washington field office. We see a transcript. He was at an event, he said, "and actually while I was at the function, I am also on the mailing list for my BlackBerry for CAIR". CAIR is the group that the Director had said that the FBI should have no involvement with. He goes on to say, "Now, Mr. Hooper, I don't know what he does all day, but I know I get BlackBerrys, must be 10 emails a day from CAIR, and if I am not aware of what is going on at CAIR, I will be at a loss, and I get these emails constantly." CAIR was an unindicted coconspirator in the Holy Land Foundation case, so a person working in the office with that environment could have some feeling, and we want to make sure that your men and women do not feel reluctant to do what they ought to do to prevent another 9/11 or a Fort Hood.

And with that, again, please take back to the men and women of the Bureau that I have great respect, and I respect the job that they do, and we want to make sure that they can do it in a way that they do not feel like they are restrained. So if there is a budgetary thing, I hope you will come here; nor should they be encumbered by being politically correct. And we will have questions—

Mr. CARTER. Mr. Chairman.

Mr. WOLF. We will have some questions. We will follow up by letter. And the last thing, make sure the Washington field office person comes by to talk to me.

Yes.

Mr. CARTER. If I could be recognized for just a second. First, if I in any way—you felt like I was attacking you in my frustration, I apologize.

Mr. GIULIANO. No, sir.

Mr. CARTER. And I just want to ask one question. You mentioned all these investigatory branches of the DOD, which I also have a high respect for, as you do, but one of the things that I really believe is endemic in the military is the perception that soldiers have that certain things, if they bring them up, hurt their career. The perfect example is seeking psychiatric treatment when you come back from a war. We have spent literally millions and millions of dollars convincing our soldiers if you have got something wrong, please tell us, it will not hurt your career, but they believe in their heart of hearts that it would. And I believe this political correctness issue at least plays among the average soldier, even up into the officer corps, as a possible career killer.

You mentioned you talked to DOD and others. Have you worked out procedures where if the FBI has a suspicion that an officer, or

an enlisted man in the military, a question is raised, like in this case, in somebody's mind, they can contact DOD and say, we have got a question here? I think if the FBI's inquiry came rather than the average soldier's inquiry, it might break the deadlock that is created by this perception the soldiers have that asking questions that are politically incorrect will get you fired. Do you see what I am getting at?

Mr. GIULIANO. Sir, is your point that it would be better if that interview, had it been conducted, been conducted by the FBI?

Mr. CARTER. Either that or at least contact DOD and say, we have got a situation here that involves one of your officers who you have been promoting regularly, and it looks like he is an officer in good standing, but an issue has come up in one of our agent's minds that we want to—we will lateral the ball to you to look into it or whatever. Because what you hear from people in the DOD is as we look back now, Hasan had all kinds of indicators clear back to medical school that he took these positions, and yet nobody said anything. And even you will hear from people over at Walter Reed that they said, we were for getting him out of here and getting him someplace else because he was asking all these questions. He was interviewing soldiers coming back from the front with, did you ever consider that you are attacking religious people and all this stuff? But they wouldn't raise the issue for fear of their career. If the FBI put an indicator in, maybe then the investigation would have started at the DOD level.

Mr. GIULIANO. That is right.

Mr. CARTER. I am just trying to get past that taboo that we seem to see in the military. It sure would help.

Mr. GIULIANO. Okay.

Mr. CARTER. If you all have a communication as to how can we touch base with you when we have got a problem.

Mr. GIULIANO. I think under this new procedure, sir, even an assessment guardian lead, which is our tip lead for tips that may come in from the general public or from anybody else, that, too, is shared with our NJTTF personnel and DOD. So really anything that we have related to the military would be shared, so hopefully that would take care of it.

Mr. CARTER. That was my question. That is very good. Thank you very much.

Thank you, Mr. Chairman.

Mr. WOLF. Thank you, Mr. Carter.

Also, I think you would agree, an interview would have been good, but an interview in the future will be very good because the interview may very well find that the person is totally innocent. Or if the person was going off the wrong path to do the wrong thing, the very interview of the FBI coming out and interviewing the individual may very well put pause in their mind and divert that. Would that not be accurate?

Mr. GIULIANO. That is correct, sir.

Mr. WOLF. Okay, good. So I think the more interviews, the better.

With that, the hearing is adjourned.

Mr. GIULIANO. Thanks.

QUESTIONS FOR THE RECORD—MR. ADERHOLT

PERSONNEL

In your testimony, you state that “personnel who handled counterintelligence information made mistakes.” However, the final report finds that the mistakes did not result from intentional misconduct or the disregard of duties.

Question. Could you please clarify the nature of these mistakes? Were they due to the personnel perhaps fearing that a warning which included the possibility of violence motivated by religion, or a particular religion, would get them in trouble with their superiors? Was this problem widespread?

Answer. The Webster Commission’s findings focused on the way personnel handled counterterrorism information in the context of the authorities, policies, operational capabilities, and technology in place before the Fort Hood shootings. The Webster Commission did not conclude that actions were taken, or were not taken, because of fear that an action would displease a supervisor. Specifically, in the context of the decision not to interview Nidal Hassan—a decision that the Commission described as “flawed”—it identified two investigative reasons for that decision: first, that an investigation could jeopardize the Anwar Aulaqi investigation; and second, that, because Hassan was not involved in terrorist activities, an interview would not satisfy the FBI’s requirement to use the least intrusive means to collect intelligence and conduct investigations.

Question. What is being done to prevent similar problems in the future?

Answer. The Commission made 18 recommendations to address FBI policies and technology related to the mistakes it identified. The FBI agrees with the principles underlying all of the Commission’s recommendations and has taken steps to address each one. (A list of the recommendations and the actions taken by the FBI to address each one is available on the FBI’s website at: <http://www.fbi.gov/news/pressrel/press-releases/judge-webster-delivers-webster-commission-report-on-fort-hood>.) Immediately after the Fort Hood attacks, the FBI worked with the Department of Defense (DoD) to streamline and enhance information-sharing agreements. These agreements include procedures that will foster awareness by senior Pentagon officials and the DoD representatives on the FBI’s Joint Terrorism Task Forces (JTTFs) of all FBI cases involving the military and that will better enable the FBI and DoD to share information in support of the FBI’s mission. Other steps include the internal issuance of formal guidance to all FBI offices regarding the management and oversight of counterterrorism matters; formal guidance regarding the resolution of inter-office disagreements; formal guidance regarding the handling of counterterrorism leads; expanded

mandatory training; and the completion and implementation of data management and integration projects and policies designed to help agents, analysts, task force officers, and other personnel more effectively review, evaluate, and exploit information.

IMPLEMENTATION OF COMMISSION RECOMMENDATIONS

The Webster Commission laid out 18 specific recommendations and according to your testimony, the FBI concurs with the principles of these recommendations.

Question. Are there any areas within these recommendations that the FBI feels go too far or not far enough? If so, where were the disagreements and what is the FBI doing to reconcile those issues?

Answer. The FBI concurs with the principles underlying all of the recommendations and has already taken action to implement them based on the Commission's work, the FBI's own internal review of the Fort Hood shootings, and the report of the U.S. Senate Committee on Homeland Security and Governmental Affairs. Among other things, the FBI agrees with the Webster Commission that there may be situations in which the assignment of a Joint Terrorism Task Force officer as lead investigator may not best serve an investigation. However, we also recognize and value the unique contributions of task force officers, including their specialized knowledge and familiarity with their home agency's systems and procedures. Accordingly, we will assess the proper assignment for each investigation based on the circumstances of each case.

Question. In the areas where the FBI has issued guidance or new policy, what kind of oversight is being conducted to ensure full implementation?

Answer. After the Fort Hood attacks, the FBI worked with DoD to execute new information-sharing agreements. These agreements include procedures that will foster awareness by senior Pentagon officials and the DoD representatives on the FBI's Joint Terrorism Task Forces of all FBI cases involving the military and that will better enable the FBI and DoD to share information in support of the FBI's mission. Because the FBI centralized the command and control of our counterterrorism operations after the 9/11 attacks, the FBI's Counterterrorism Division (CTD) is now able to exercise counterterrorism program management and oversight. This enables CTD to direct and monitor compliance with the guidance and policy issued in response to the Commission's recommendations. In addition to CTD, other entities at FBI Headquarters, including our Inspection Division and Office of Integrity and

Compliance, regularly conduct reviews to monitor FBI compliance with our policies and procedures and direct corrective action in appropriate cases.

WILLIAM H. WEBSTER

International Square Building
1850 K Street, N.W.
Suite 1100
Washington, D.C. 20006

July 12, 2012

The Honorable Robert S. Mueller III
Office of the Director
Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535

Dear Director Mueller:

On December 17, 2009, you asked me to conduct an independent investigation of the Federal Bureau of Investigation's handling of counterterrorism intelligence before and after the tragic shootings at Fort Hood, Texas, on November 5, 2009. Although the FBI had conducted its own internal investigation in the immediate aftermath of the shootings and had implemented procedural, operational, and technological improvements, you believed that an objective, independent review was critical to understanding the FBI's actions and assessing the potential for further improvements.

I appreciate your decision to entrust me with this important work. I agreed to what proved to be a complex and lengthy assignment. The Terms of Reference were extraordinary in scope. You requested not only a full investigation of the manner in which the FBI and its Joint Terrorism Task Forces handled and acted on counterterrorism intelligence before and after the shootings, but also a review and assessment of the FBI's governing authorities and the FBI's remedial measures in the aftermath of Fort Hood – with a particular focus on whether existing laws and policies strike an appropriate balance between protecting individual privacy rights and civil liberties and detecting and deterring threats. That broad mandate was complicated, and its importance underscored, by subsequent terror-related events.

In discharging my duties, I asked several distinguished citizens to volunteer their time to serve as Commissioners and Staff. Their contributions of time and energy were

substantial, adding to the already significant demands of their work in the private sector. Their commitment to this investigation and the resulting report was an act of selfless patriotism.

The Commission took its responsibilities seriously. I want to acknowledge the diligence and care with which my colleagues pursued the sensitive, complex matters under review. The investigation was careful and meticulous. Our discussions were vigorous. The Commissioners asked questions and expressed their perspectives, concerns, and opinions with candor. Although we disagreed from time to time during the course of our investigation, we are unanimous in our factual findings, our analysis of the FBI's actions, our recommendations, and every other aspect of the Final Report.

When I agreed to undertake this project, you promised the FBI's full cooperation and support. That promise was fulfilled. I commend the cooperation and candor of FBI, Joint Terrorism Task Force, and Department of Justice personnel at every level. We particularly appreciated, and commend, the assistance of your appointed liaison, Special Counsel James D. Walsh.

We have not hesitated to identify shortcomings when we found them. We conclude that, working in the context of the FBI's governing authorities and policies, operational capabilities, and the technological environment of the time, FBI and Joint Terrorism Task Force personnel who handled relevant counterterrorism intelligence information made mistakes. We do not find, and do not suggest, that these mistakes resulted from intentional misconduct or the disregard of duties. Indeed, we find that each Special Agent, Intelligence Analyst, and Task Force Officer who handled the information acted with good intent.

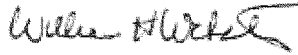
We do not find, and do not believe, that anyone is solely responsible for mistakes in handling the information. We do not believe it would be fair to hold these dedicated personnel, who work in a context of constant threats and limited resources, responsible for the tragedy that occurred months later at Fort Hood. We conclude instead that these individuals need better policy guidance to know what is expected of them in performing their duties. We conclude that FBI personnel need better technology, review protocols, and training to navigate the weighty and ever-expanding flow of intelligence information. We also conclude that the FBI should continue to focus on compliance monitoring and the oversight of authorized investigative techniques that may affect privacy rights and civil liberties.

We make eighteen (18) formal recommendations for corrective and enhancing measures on matters ranging from FBI policies and operations to information systems infrastructure, review protocols, and training. We also identify, but take no position on, two legislative actions that the FBI could propose to improve its ability to deter and detect terrorist threats. Finally, as requested, we assess whether any administrative action should be taken against any employee involved in this matter, and we conclude that administrative action is not appropriate.

Although we recommend corrective and enhancing measures, nothing said in this report is intended to cast doubt on the dedication and professionalism of the men and women who serve our nation in combating terror and crime.

I am pleased to submit the Final Report of the William H. Webster Commission on the Federal Bureau of Investigation, Counterterrorism Intelligence, and the Shootings at Fort Hood, Texas, on November 5, 2009.

Sincerely,

A handwritten signature in dark ink, appearing to read "William H. Webster", with a stylized, sweeping flourish at the end.

William H. Webster

FINAL REPORT
of the
WILLIAM H. WEBSTER
COMMISSION
on
The Federal Bureau of Investigation,
Counterterrorism Intelligence,
and the Events at
Fort Hood, Texas,
on November 5, 2009



**The William H. Webster Commission
on the Federal Bureau of Investigation, Counterterrorism Intelligence, and
the Events at Fort Hood, Texas, on November 5, 2009**

The Honorable William H. Webster
Chair

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Deputy Chair and Editor-in-Chief

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Russell J. Bruemmer

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COMMISSION BIOGRAPHIES

William H. Webster served as Director of the Federal Bureau of Investigation from 1978 to 1987, and as Director of Central Intelligence from 1987 to 1991. He also served as U. S. Attorney for the Eastern District of Missouri from 1960 to 1961 and as U.S. District Judge for that District from 1970 to 1973. In 1973, Judge Webster was elevated to the U.S. Court of Appeals for the Eighth Circuit, a position he held until 1978. Judge Webster is a graduate of Amherst College and Washington University Law School. He served as a Lieutenant in the U.S. Navy in World War Two and the Korean War. Judge Webster is a retired partner in the law firm Milbank, Tweed, Hadley & McCloy.

Commissioners

Douglas E. Winter is Of Counsel and a former partner in the law firm Bryan Cave LLP, where he is Head of the firm's Electronic Discovery Unit. He specializes in complex litigation and investigations, information technology and review, and records management. He served as law clerk to Judge William H. Webster on the U.S. Court of Appeals for the Eighth Circuit from 1975 to 1976. He served as a Captain in the U.S. Army. Mr. Winter is a graduate of the University of Illinois, Harvard Law School, and the U.S. Army Judge Advocate General School.

Adrian L. Steel, Jr. is a partner in the law firm Mayer Brown LLP, where he served as Chair of the firm's global Pro Bono Committee from 2005 to 2011. His primary practice involves antitrust and regulatory law. He served as a Special Assistant to Director William H. Webster at the Federal Bureau of Investigation from 1978 to 1981. He also served as a law clerk to Judge Webster on the U.S. Court of Appeals for the Eighth Circuit from 1975 to 1976. Mr. Steel is a graduate of the University of Missouri-Columbia and the University of Michigan Law School.

William M. Baker, a consultant, retired from the Federal Bureau of Investigation in 1991. As Assistant Director, Criminal Investigative Division, he was responsible for all FBI criminal investigations, including counterterrorism. He also served as the FBI Assistant Director of Congressional and Public Affairs, and as Director of Public Affairs at the Central Intelligence Agency from 1987 to 1989. He was Senior Vice President of the Motion Picture Association of America and then President of its international arm from 1991 to 2000. Before joining the FBI, he served as a Lieutenant in the U.S. Air Force Office of Special Investigations. Mr. Baker is a graduate of the University of Virginia.

Russell J. Bruemmer is a partner in the law firm WilmerHale, where he is Chair of its Financial Institutions Group. He served as Special Counsel to Director William H. Webster at the Central Intelligence Agency and as the CIA's General Counsel from 1987 to 1990. He served as Special Assistant to Director Webster at the Federal Bureau of Investigation from 1978 to 1980, and FBI Chief Counsel-Congressional Affairs from 1980 to 1981. He also served as law clerk to Judge Webster on the U.S. Court of Appeals for the Eighth Circuit from 1977 to 1978. Mr. Bruemmer is a graduate of Luther College (Iowa) and the University of Michigan Law School.

Kenneth L. Wainstein is a partner in the law firm Cadwalader, Wickersham & Taft LLP, with expertise in corporate internal investigations and civil and criminal enforcement actions. He served as FBI General Counsel and Chief of Staff to Director Robert S. Mueller II (2002-2004); the first Assistant Attorney General for National Security (2006-2008); and Homeland Security Advisor to the President (2008-2009). He has been U.S. Attorney for the District of Columbia (2004-2006); Director of the Executive Office for U.S. Attorneys (2001-2002); and an Assistant U.S. Attorney in the Southern District of New York and the District of Columbia (1989-2001). Mr. Wainstein graduated from the University of Virginia and the Law School of the University of California at Berkeley. He served as law clerk Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia.

Adjutant

Stephen J. Cox is Corporate Counsel at Apache Corporation. He is a former senior associate at WilmerHale, where his practice focused on Congressional investigations, crisis management, litigation, and regulatory affairs. He served as a law clerk to Judge J. L. Edmondson on the U.S. Court of Appeals for the Eleventh Circuit from 2006 to 2007 and as Advisor to the Assistant Secretary of U.S. Immigration and Customs Enforcement from 2007 to 2008. Mr. Cox is a graduate of Texas A&M University and the University of Houston Law Center.

Associates

George F. Murphy is an associate in the Washington, D.C., office of the law firm Bryan Cave LLP. His practice involves white collar criminal defense and investigations and international trade. He has served on the Advisory Board of the Children's Law Center since 2010. Prior to practice, he served as a law clerk for the Appellate Defense Division of the U.S. Navy Judge Advocate General's Corps. Mr. Murphy is a graduate of Brown University and George Washington University Law School.

Margaret-Rose Sales is an associate in the Washington, D.C., office of the law firm Mayer Brown LLP. She practices in the Government and Global Trade Group. Ms. Sales worked earlier at U.S. Customs Border Protection, Department of Homeland Security. She is a graduate of McGill University, Georgetown University, and Georgetown University Law School.

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Introduction

On December 17, 2008, United States Army Major Nidal Malik Hasan visited the website of radical Islamic cleric Anwar al-Aulaqi. He sent a message to Aulaqi. The Federal Bureau of Investigation acquired the message. A second message followed on January 1, 2009. Members of the Joint Terrorism Task Force (JTTF) in the San Diego Field Office reviewed the messages. Concerned by the message's content and implications that the sender was a U.S. military officer, San Diego set a lead to International Terrorism Operations Section 1 at FBI Headquarters and the JTTF in the Washington, D.C., Field Office (WFO).

Five months later, WFO conducted an assessment of Hasan, who worked as a psychiatrist at the Walter Reed Army Medical Center. WFO queried certain FBI and Department of Defense (DoD) databases and reviewed the limited set of Army personnel records available to DoD personnel serving on JTTFs. In the meantime, San Diego had acquired and reviewed fourteen additional messages and emails from Hasan to Aulaqi and two emails from Aulaqi to Hasan.

WFO did not assess Hasan to be involved in terrorist activities. San Diego advised WFO that the assessment was inadequate. Neither Field Office took any further action. Hasan sent his last message to Aulaqi on June 16, 2009. Aulaqi did not respond.

Effective July 15, 2009, the Army assigned Hasan to the Darnall Army Medical Center at Fort Hood, Texas. In October 2009, the Army notified Hasan that he would be deployed to Afghanistan in November 2009.

On November 5, 2009, Hasan entered the Fort Hood deployment center. He carried two pistols. He jumped on a desk and shouted "Allahu Akbar!" – Arabic for "God is great!" Then he opened fire, killing twelve U.S. soldiers and one DoD employee, and injuring forty-two others.

The FBI immediately conducted an internal review of how San Diego and WFO handled Hasan's communications with Aulaqi. As a result of the review, the FBI took specific steps to improve its ability to detect and deter threats like Hasan. Those steps focused primarily on FBI-DoD information-sharing, FBI Headquarters involvement in reviewing significant national security cases, information technology improvements, and training.

FBI Director Robert S. Mueller, III, determined that an additional, independent investigation of the FBI's actions was appropriate.

A. The Terms of Reference

On December 17, 2009, Director Mueller asked William H. Webster, a former U.S. Attorney, U.S. District Judge, U.S. Circuit Judge, Director of the FBI, and Director of the Central Intelligence Agency, to conduct an independent investigation of the FBI's handling of the Hasan information. Without limiting the investigation, Director Mueller's Terms of Reference asked Judge Webster to examine:

- (1) the laws and policies applicable to the FBI's assessment of the threat posed by Major Hasan;
- (2) whether the FBI complied with applicable laws and policies;
- (3) whether the actions taken by the FBI were reasonable under the circumstances known at the time, and, if not, whether any administrative action should be taken against any employee;
- (4) whether current laws and policies strike an appropriate balance between protecting individuals' privacy rights and civil liberties and detecting and deterring threats such as that posed by Major Hasan;
- (5) whether the steps the FBI is taking following an internal review of the shooting are sufficient or whether there are other policy or procedural steps the FBI should consider to improve its ability to detect and deter such threats in the future; and
- (6) whether the FBI should propose any legislative action to improve its ability to detect and deter such threats while still respecting privacy and civil-liberty interests.

B. The Investigation

Judge Webster assembled a team of seasoned investigators and attorneys to assist him. The FBI provided the Webster Commission with unfettered access to personnel, documents, and technology. An FBI liaison assisted in scheduling briefings, interviews, and Field Office visits, and in identifying and producing FBI, Department of Justice (DOJ), DoD, and other government documents. The FBI and the DOJ provided the Commission with more than 50 formal interviews, meetings, and briefings; a far greater number of informal briefings and meetings; and more than 300 documents totaling more than 10,000 pages. The FBI's Special Technologies and Applications Section provided Commission members with direct access to FBI computer systems, applications, and databases.

The Commission or its specialized teams conducted investigative interviews of all FBI and other JTTF personnel who handled the Hasan information; conducted on-site visits and interviews with counterterrorism squads and intelligence fusion cells in Northern Virginia, Philadelphia, and Los Angeles that were not involved in the Hasan matter; and performed or supervised comprehensive searches of the FBI's data holdings on Hasan and Aulahi. To obtain a broad range of perspectives, the Commission also consulted with outside experts on

counterterrorism, intelligence operations, information technology, and Islamic radicalism; public interest groups that promote and protect civil liberties and privacy interests; and staff from Congressional committees with FBI oversight responsibilities. The input of more than 300 persons informs our investigation and recommendations. We also reviewed hundreds of non-government documents relevant to our inquiries.

Throughout our investigation, we witnessed the ever-increasing challenge that electronic communications pose to the FBI's efforts to identify and avert potentially destructive activity. Although this Report reviews the specifics of one tragic event, it also speaks to transcendent issues that are crucial to the FBI's ability to combat terrorism in the electronic age.

Part One of this Report presents our Factual Findings. Chapters 1 and 2 discuss the challenge of violent radicalization and one of the FBI's primary responses, the Joint Terrorism Task Force program. Chapters 3 and 4 review the legal, operational, and technological framework for the FBI actions at issue. Chapter 5 describes the FBI's investigation of Anwar al-Aulaqi. Chapter 6 describes the FBI's actions in connection with the Hasan-Aulaqi communications. Chapter 7 summarizes our review of the FBI's data holdings to identify what information about Hasan and the Hasan-Aulaqi communications was available to the FBI before and after the Fort Hood shootings.

Part Two contains our Analysis of the reasonableness and adequacy of the FBI's actions in the context of the governing authorities, FBI policies and practices, and the operational and technological environment of the time.

Part Three assesses the adequacy of the remedial steps that the FBI took following its internal review of the Fort Hood shootings.

Part Four considers whether the FBI's governing authorities properly balance civil liberties and privacy interests with the FBI's counterterrorism obligations. It also discusses the potential evolution of those authorities.

Part Five contains our Recommendations for additional improvements to enhance the FBI's ability to fulfill its counterterrorism mission and make our country a safer place to live while respecting civil liberties and privacy interests.

C. FBI/U.S. Intelligence Community Personnel Identifiers

At the FBI's request, this Report identifies FBI and other U.S. Intelligence Community personnel by anonymous abbreviations that indicate each person's geographic location or headquarters assignment and job title.

San Diego Field Office/Joint Terrorism Task Force

FBI Supervisory Special Agent	SD-SSA
FBI Special Agent	SD-Agent
FBI Intelligence Analyst	SD-Analyst
Task Force Officer 1 (NCIS)	SD-TFO1
Task Force Officer 2 (NCIS)	SD-TFO2
Task Force Officer 3 (DCIS)	SD-TFO3

Washington, D.C., FBI International Terrorism Operations Section 1

FBI Supervisory Special Agent	ITOS1-SSA
FBI Special Agent	ITOS1-Agent
FBI Intelligence Analyst	ITOS1-Analyst

Washington, D.C., Field Office/Joint Terrorism Task Force

FBI Supervisory Special Agent	WFO-SSA
FBI Intelligence Analyst	WFO-Analyst
Task Force Officer (DCIS)	WFO-TFO

Department of Defense, Defense Criminal Investigative Service

DoD Intelligence Analyst	DCIS-Analyst
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An Index of all acronyms used in this Report is appended.

D. FBI/U.S. Intelligence Community Redactions

This Final Report reviews sensitive counterterrorism intelligence and other classified information. The FBI National Security Legal Branch, in cooperation with other members of the U.S. Intelligence Community, has redacted that classified information – and only that information – from the public version of the Final Report. The public version includes, to the extent possible, unclassified descriptions of the content of those redactions. [Those descriptions, like this sentence, appear in brackets.]

Part One

Factual Findings

Chapter 1

Violent Radicalization

A. Introduction

The Fort Hood shootings are a grim reminder that violent radicalization is a persistent threat to the United States and its citizens and residents. Radicalization – whether based on religious, political, social, or other causes – challenges the capability and capacity of the FBI and other members of the U.S. Intelligence Community to identify, collect, analyze, and act on accurate intelligence in time to detect and deter those who would commit violence.

Although highly publicized terrorist plots and acts – and the Fort Hood shootings – have referenced Islam, violent radicalization transcends any one religion – and, indeed, religion – and can find causes in political, social, environmental, and other contexts. The FBI's report on terrorist acts in the U.S. between 1980 and 2005 identified 318 events (including bombings, arson and malicious destruction, and shootings); only 7% of those events were attributed to Islamic extremists. Federal Bureau of Investigation, *Terrorism 2002–2005* (2d ed. 2007).

Radicalism is not a crime. Radicalization alone, without incitement to violence, may not constitute a threat. Our Constitution protects thoughts, words, and even actions associated with extremism, including speeches, public assemblies, and attendance at places of worship. There are limits, of course. The First Amendment, for example, does not embrace language that can cause objective harm to people, their possessions, or their liberties. The Constitution does not shield those who, in pursuit of radical ends, would cause harm – or those who incite or support those who would cause harm.

In a 2006 speech, FBI Director Mueller observed that understanding radicalization and countering its violent ends require constant calibration of how the FBI understands “the line between the extremist and the operational.” See Director Robert S. Mueller, III, *The Threat of Homegrown Terrorism*, Speech to The City Club of Cleveland (June 23, 2006). In the age of electronic communications, that line can be difficult to discern.

Nidal Malik Hasan's transformation into a killer underscores the dilemma confronting the FBI. Hasan was a licensed psychiatrist and a U.S. Army Major with fifteen years of military service. He was a member of two professional communities – mental health and defense – whose missions include protection against violence. He worked at Walter Reed Army Medical Center and other facilities in close and constant contact with other U.S. military personnel, including fellow psychiatrists. He was a religious person. He had no known foreign travel. Other than his eighteen communications with Anwar al-Aulaqi, he had no known contact and no known relationships with criminal elements, agents of foreign powers, or potential terrorists.

This Report considers a myriad of factors that affect the FBI's ability to detect – and, when legally possible, deter and disrupt – the violent radicalization of U.S. persons. These factors include the FBI's legal authority, written and informal policies, operational capability and capacity, access to information, and technology. In this Chapter, we examine the pre-eminent factor: the FBI's understanding of violent radicalization.

We spoke with FBI counterterrorism officials, as well as Agents, Analysts, and Task Force Officers at FBI Headquarters and in the field, to examine the FBI's understanding of violent radicalization and its implications for intelligence, operations, and training before and after the Fort Hood shootings. We consulted in unclassified settings with Jerrold Post, M.D., Professor of Psychiatry, Political Psychology, and International Affairs at George Washington University. (Dr. Post served 21 years with the Central Intelligence Agency, where he founded and directed the CIA's Center for the Analysis of Personality and Political Behavior. The CIA awarded Dr. Post the Intelligence Medal of Merit in 1979 and the Studies in Intelligence Award in 1980. He is a Life Fellow of the American Psychiatric Association, and the Association's Chair of the Task Force for National and International Terrorism and Violence.) We also reviewed contemporary learned texts to examine the psychiatric community's understanding of violent radicalization and the role of the Internet in violent radicalization.

B. The Process of Violent Radicalization

1. The Dynamics of Violent Radicalization

The psychiatric community has identified the fundamental dynamics of violent radicalization:

- (a) Most terrorists are psychologically normal as individuals, and do not fit a medical diagnostic category.
- (b) Radicalization is not precipitous, but a process with “many way stations....”
- (c) Violent radicals are creatures of a collective identity. Group, organizational, and social psychology – not individual psychology – provide the most powerful insights on terrorist behavior. (Indeed, group psychology plays an integral role in “self-radicalization” as well as “lone wolf” terrorism.)
- (d) Leaders are essential to radicalization. Leaders draw together alienated, discontented, and isolated followers who are prone to or ready to accept a collective identity.
- (e) Radicalization occurs when followers submit to the collective identity and leaders identify a shared enemy as a target for violent behavior.
- (f) Radicalization involves “a continuing reinforcement by manipulative leaders, consolidating collective identity, externalizing, and justifying ... [and then] requiring violence against the enemy.”

J.M. Post, *et al.*, *The Psychological and Behavioral Bases of Terrorism: Individual, Group and Collective Contributions*, 14 INT'L AFF. REV. 195, 196-99 (Fall 2005).

2. The FBI Model

In 2007, the FBI published a model of violent radicalization that parallels the understanding of the psychiatric community. See C. Dyer *et al.*, *Countering Violent Islamic Extremism*, FBI LAW ENFORCEMENT BULLETIN, Dec. 2007.

The FBI model describes the process of violent radicalization – the “way stations” – as four incremental stages of development:

Preradicalization → Identification → Indoctrination → Action

“Pre-radicalization” is measured by an individual’s motivation, stimuli, and opportunity to radicalize. C. Dyer *et al.*, at 6. A motivation for conversion – whether to a religion or another cause – is critical to the process, and can take several forms.

“Acceptance seeking” conversions are a product of human nature – the need to form and maintain interpersonal relationships. Persons with limited or fragile social ties may find acceptance in the solidarity of extremist groups. In “jilted-believer” and “faith reinterpretation” conversions, persons frustrated or dissatisfied with a belief system embrace a more militant system. In “protest” conversions, the individual rebels against, or seeks an identity separate from, family, society, or circumstances.

Stimulus is typically provided by a respected leader whose words, actions, or public persona inspire conversion. The opportunity to radicalize ordinarily involves exposure to the commitment of others to the leader or the cause. Differing venues can provide stimulus and opportunity, including prisons, places of worship, universities, private settings, and the Internet.

The second phase of radicalization, “Identification,” is marked by acceptance of and devotion to the cause. C. Dyer *et al.*, at 6. Accepting the cause often leads converts to become isolated from their former lives as they seek guidance from the leader or other followers about how to become more committed to the cause. Social interaction with other followers and travel to live near or within the group may accelerate the process.

“Indoctrination” involves a conviction that the cause requires violent action. C. Dyer *et al.*, at 6. It commonly occurs through active participation in or access to the cause’s activities and inner workings. Converts assert a personal stake in the cause and believe that action is needed to support the cause. In religious contexts, extremist clerics can play a major role in indoctrination because of their emotional hold over impressionable followers and their ability to provide spiritual justification for violence.

"Action" is the manifestation of a commitment to engage in violence. C. Dyer *et al.*, at 6. Action can be violent or nonviolent (for example, financing or facilitating others who pursue violence); but its purpose is to further the cause and to harm the perceived enemy.

Radicalization to the final stage is not inevitable. The process of radicalization can be interrupted. The process can be reversed. Many persons reach only the first or second or third stage, without ever entering the stage of action.

The objective of the FBI model is to "identify [through each stage] indicators of those who demonstrate the potential for violence," and the "patterns and trends of extremist behavior." C. Dyer *et al.*, at 4, 8. The challenge lies in finding actionable indicators in time to respond in a lawful manner to the potential for violence. Reliable indicators of radicalization are more difficult to detect and act on in nascent stages. The early phases of radicalization may take place outside the knowledge of anyone but the radicalizing individual. They may also take place in ways that implicate the civil liberties and privacy interests of U.S. persons, cautioning or demanding investigative restraint. Even if the FBI obtains intelligence evidencing an individual in the radicalization process, that intelligence may not provide a legitimate basis for investigation. A person's opportunity to radicalize – for example, by downloading an audio file of a radical speech or sermon – is alone not a justification for investigation. An individual's acceptance of a cause – for example, by joining a peaceful demonstration against Israeli settlements in Palestine – is alone not a justification for investigation. Even an individual's conviction that a cause requires action – for example, by writing an op-ed article in support of Hamas – may not provide a justification for investigation, if that individual shows no inclination to take violent action based on that conviction.

The difficulties of detecting violent radicalization and justifying FBI intervention are exacerbated because the four stages of radicalization progress with ever-increasing speed. Pre-radicalization and identification may take years. Indoctrination and action may take months, weeks, even days. Detection in the early stages may be impossible. Detection in the later stages may not allow time to respond before violence occurs.

3. The Lone Actor and Internet Radicalization

Newspaper reports recently quoted President Obama as stating that "the most likely scenario that we have to guard against right now ends up being more of a lone wolf operation than a large, well coordinated terrorist attack." Associated Press (August 17, 2011). For nearly a decade, the FBI has forecast the dangers of "lone wolf" terrorists, both international and domestic. See The FBI Strategic Plan 2004-2009; Testimony of Patrick Rowan, FBI Acting General Counsel, before the House Perm. Sel. Comm. on Intelligence (July 23, 2003).

Lone actors can pass through the four stages of radicalization with little or no personal contact with a leader or another violent radical – and thus without conventional accomplices, co-conspirators, or handlers. Evolving communications technologies – most notably, the Internet – play an increasingly weighty role in the phenomenon of the lone actor. Radical voices can provide leadership via the Internet at each stage of radicalization, including a call to action for

individuals who have no other association with them. For example, the al-Qaeda Internet treatise *Iraqi Jihad, Hopes and Risks* was the apparent inspiration for the 2004 Madrid train bombings.

The Internet can provide individuals with remote, yet regular, access to the teachings and instructions of violent radical leaders, supplanting the real-world meeting places traditionally used to radicalize – and traditionally used by the FBI to detect violent radicalization. The Internet also offers exposure to extraordinary amounts of information at little or no cost; the ability to join and participate in virtual networks of like-minded individuals, finding the group identity that is part of radicalization; and, of course, the potential for shrouding identities.

A crucial lesson of Fort Hood is that the information age presents new and complex counterterrorism challenges for the FBI. Diverse and ever-growing waves of electronic information confront its law enforcement and intelligence-gathering activities. Emerging technologies demand changes in the ways that the FBI acquires, stores, reviews, organizes, manages, disseminates, and acts on intelligence.

Chapter 2

The Joint Terrorism Task Force Program

The actions under review took place in the context of the FBI's Joint Terrorism Task Force (JTTF) program. The San Diego JTTF identified the first two communications from Hasan to Aulaqi and set a lead on Hasan to the Washington, D.C., JTTF.

The Department of Justice (DOJ) and the FBI developed the JTTF program as a counterterrorism partnership among U.S. law enforcement and intelligence agencies. The FBI and the New York City Police Department established the first JTTF in 1980. By September 11, 2001, there were 35 JTTFs in the U.S. Today, there are 104 JTTFs, including at least one in each of the FBI's 56 Field Offices.

The JTTF program organizes and coordinates federal, state, and local resources in an effort to detect, deter, disrupt, and otherwise respond to the threat of terrorism. Each JTTF is a cell of trained investigators, intelligence analysts, linguists, and other specialists from the FBI and other law enforcement, intelligence, and public safety agencies (including, for example, Immigration and Customs Enforcement, Secret Service, regional transit authorities, state highway patrols, and local police departments). JTTF members engage in surveillance, electronic intercepts, source development, interviews, database analysis, and other investigative techniques. They operate daily in the realm of counterterrorism, facing threats that range from lone actors to international terrorist networks.

The JTTF program's success in combating terrorism is well-documented. JTTFs have played crucial roles in foiling major terrorism plots that include, among others:

- Antonio Martinez (planned attack on military recruiting center in Catonsville, Maryland)
- Mohamed Osman Mohamud (planned attack on tree-lighting ceremony in Portland, Oregon)
- Farooque Ahmed (plot to bomb Metrorail stations in Northern Virginia)
- Shaker Masri (planned travel to Somalia to support al Shabaab)
- Zachary Chesser (planned travel to Somalia to support al Shabaab)
- Mohammed Mahmood Alessa and Carlos Eduardo Almonte (planned travel to Somalia to support al Shabaab)
- Hosam Smadi (plot to bomb office building in Dallas, Texas)

- Michael Finton (plot to detonate bomb outside federal building in Springfield, Illinois)
- James Cromitie (plot to bomb a synagogue and military facility in New York City)
- Khalid Ali-M Aldawsari (attending college on student visa; purchased equipment and chemicals to make an improvised explosive device in Lubbock, Texas)
- Colleen LaRose (recruitment of jihadist fighters to commit murder overseas)
- Abu Khalid Abdul-Latif and Walli Majahidh (plot to attack military recruiting center in Seattle)
- Waad Ramadan Alwan and Mohanad Shareef Hammadi (plot to ship money and weapons in support of al Qaeda in Iraq)

The FBI and its JTTF partners established the National Joint Terrorism Task Force (NJTTF) in 2002 to provide a central forum for sharing terrorism threats and intelligence among federal, state, and local agencies, and to provide program management, oversight, and support for JTTFs. The NJTTF is organized within the FBI Counterterrorism Division and at the National Counterterrorism Center. It has 42 member agencies: 11 Department of Defense agencies; 27 other federal agencies; and four state, regional, or local agencies.

The FBI enters into a Memorandum of Understanding or other formal agreement to define each agency's participation in the program. Under these agreements, the FBI funds the participating agencies' direct expenses, including overtime, vehicles, fuel, mobile telephones, and office costs. JTTF personnel from the participating agencies – who are known as Task Force Officers – carry out their duties subject to the laws, policies, and other authorities that govern the FBI. Our examination of the FBI's actions in the Hasan matter thus begins with a review of those governing authorities.

Chapter 3

The FBI's Governing Authorities

The Terms of Reference asked Judge Webster to examine “the laws and policies applicable to the FBI’s assessment of the threat posed by Major Hasan.”

A. Primary Authorities

1. The Attorney General

The FBI’s primary investigative authority derives from the statutory authority of the Attorney General. See 28 U.S.C. §§ 509, 509A, 510, 533, and 534. The Attorney General delegates that authority, primarily in 28 C.F.R. § 0.85, which provides that the FBI shall “[i]nvestigate violations of the laws ... of the United States and collect evidence in cases in which the United States is or may be a party in interest....” Id.

The FBI has lead investigative responsibility for domestic and international terrorism, which includes, among other things, the unlawful use of force and violence against persons or property to intimidate or coerce a government or civilians in furtherance of political or social objectives. See 18 U.S.C. §§ 2331(1) and (5) (providing the complete definition of “terrorism,” including the distinction between domestic terrorism and international terrorism). Within the United States, the FBI’s counterterrorism mission includes “the collection, coordination, analysis, management and dissemination of intelligence and criminal information as appropriate.” 28 C.F.R. § 0.85(l).

2. Executive Order 12333

The FBI’s intelligence-gathering authorities also derive from Executive Order 12333, issued by President Ronald Reagan in 1981 and amended by subsequent administrations. The Executive Order grants the U.S. Intelligence Community – including the FBI – the power to use “[a]ll [lawful] means ... to obtain reliable intelligence information to protect the United States and its interests,” while preserving the civil rights, liberties, and privacy of all U.S. persons. Exec. Order No. 12333 at § 1.1 (Dec. 4, 1981), as amended by Exec. Order Nos. 13284 (2003), 13355 (2004), and 13470 (2008). It authorizes the FBI, under the supervision and regulations of the Attorney General, to:

- (1) collect (including through clandestine means), analyze, produce and disseminate foreign intelligence and counterintelligence to support national and departmental missions, in accordance with procedural guidelines approved by the Attorney General, after consultation with the Director;
- (2) conduct counterintelligence activities; and

- (3) conduct foreign intelligence and counterintelligence liaison relationships with intelligence, security, and law enforcement services of foreign governments or international organizations....

Id. at § 1.7(g). “Foreign intelligence includes information relating to the capabilities, intentions, or activities of ... international terrorists.” Id. at § 3.5(e).

This broad authority is balanced by the Executive Order’s declaration that “[e]lements of the Intelligence Community are authorized to collect, retain, or disseminate information concerning United States persons only in accordance with procedures established by the head of the Intelligence Community element concerned or by the head of a department containing such element and approved by the Attorney General....” Exec. Order No. 12333 at § 2.3. The Executive Order protects against the misuse of foreign intelligence and guards the privacy of U.S. persons by specifying “that no foreign intelligence collection by [Intelligence Community elements other than the FBI] may be undertaken for the purpose of acquiring information concerning the domestic activities of United States persons.” Id. at § 2.3(b). A “U.S. person” is a citizen, lawfully admitted permanent resident alien, or corporation incorporated in the U.S. Id. at § 3.5(k).

Executive Order 12333 also requires the FBI and other Intelligence Community members to “use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad.” Exec. Order No. 12333 at § 2.4. The choice of technique and its level of intrusiveness are matters of judgment in light of the seriousness of the threat. For more serious threats, more intrusive means may be appropriate.

B. Secondary Authorities

1. The Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801 *et seq.*, establishes the process for obtaining judicial approval of electronic surveillance and physical searches to collect “foreign intelligence information.” FISA defines “foreign intelligence information” as

- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or

the security of the United States; or (B) the conduct of the foreign affairs of the United States.¹⁷

50 U.S.C. § 1801(e).

To collect foreign intelligence information under FISA's electronic surveillance and physical search provisions, the FBI must provide facts to the Foreign Intelligence Surveillance Court (FISC) establishing probable cause to believe that the target of the surveillance or search is a "foreign power" or "agent of a foreign power." 50 U.S.C. § 1804(a)(3)(A); Exec. Order No. 12333 at § 2.5. To pursue electronic surveillance, the FBI must also show that "the facilities or places at which the electronic surveillance is directed [are] being used, or are about to be used" by the target. 50 U.S.C. § 1804(a)(3)(B). To undertake a physical search, the FBI must show that "the premises or property to be searched is or about to be owned, used, possessed by or is in transit to or from" the target. 50 U.S.C. § 1823(a)(3)(C).

To balance the intrusive nature of surveillance and searches – and to protect the rights of non-consenting U.S. persons – FISA requires "minimization" procedures for the acquisition, retention, and dissemination of information collected through electronic surveillance or physical search. 50 U.S.C. §§ 1801(h), 1821(4). FISA requires the Attorney General to adopt procedures to assure, among other things, that nonpublic information that is not foreign intelligence (as defined in 50 U.S.C. § 1801(e)) or evidence of a crime is not disseminated in a manner that identifies any U.S. person without that person's consent, unless that person's identity is necessary to understand foreign intelligence or assess its importance. In most cases, the FBI follows Standard Minimization Procedures (SMPs) approved by the Attorney General and the FISC. Special minimization procedures apply in certain cases. 50 U.S.C. § 1801(h).

Other sections of FISA provide for pen registers and trap-and-trace devices for foreign intelligence purposes; access to certain business records for foreign intelligence purposes; and reporting requirements. 50 U.S.C. §§ 1841-46, 1861-63, 1871.

¹⁷ FISA defines "international terrorism" as activities that:

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
- (2) appear to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C. § 1801(c).

2. National Security Letters

Five statutes authorize the FBI to issue administrative subpoenas known as National Security Letters (NSLs) to obtain limited types of information from third-party custodians without court approval:

- (1) the Electronic Communications Privacy Act, 18 U.S.C. § 2709 (telephone and email communication records from telecommunications companies and Internet service providers);
- (2) the Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5)(A) (records of financial institutions);
- (3) the Fair Credit Reporting Act, 15 U.S.C. §§ 1681u(a) and (b) (lists of financial institutions and consumer-identifying information from credit reporting companies);
- (4) the Fair Credit Reporting Act, 15 U.S.C. § 1681v (credit reports in international terrorism cases); and
- (5) the National Security Act, 50 U.S.C. § 436 (records involving Executive Branch employees in investigations of improper disclosure of classified information).

Like grand jury subpoenas in traditional criminal cases, NSLs allow the FBI to acquire basic information that can serve as the building blocks of a national security investigation. Unlike grand jury subpoenas, however, NSLs are not issued by a U.S. attorney and are limited to the statutorily specified records. Each NSL statute has discrete standards. To our knowledge, Congress has made no effort to normalize these standards to eliminate confusion and the risk of error. Each statute contains non-disclosure provisions, which, upon certification by a specified government official, restrict the recipient's ability to disclose the NSL. The statutes require the FBI to report information to Congress about its use of NSLs. E.g., 18 U.S.C. § 2709(e).

The FBI has no other statutory authority to issue administrative subpoenas. The Attorney General has delegated the authority to the FBI to issue administrative subpoenas under 21 U.S.C. § 876 and 18 U.S.C. § 3486 for drug program investigations and child sexual exploitation and abuse investigations.

3. The PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, better known as the PATRIOT Act, was passed on October 26, 2001, in the aftermath of the September 11 attacks. Pub. L. 107-56, 115 Stat. 272 (2001). The PATRIOT Act vested the FBI with new investigative authorities to combat terrorism, amending, among other things, 50 U.S.C. §§ 1801(b)(1)(c), 1805(c)(2)(B), and 1861-63. Although not all of these authorities are relevant to the FBI's actions under review here, we discuss them because of their importance to the FBI's counterterrorism mission. The PATRIOT

Act also helped eliminate the so-called FISA “wall” between law enforcement and intelligence, which had limited the ability of criminal investigators and intelligence agents to share information.

Section 218 of the PATRIOT Act clarifies that the FBI and other members of the U.S. Intelligence Community have the authority to gather, through electronic surveillance and physical searches, “foreign intelligence information” from U.S. and non-U.S. persons. It amended FISA to require a showing that the acquisition of foreign intelligence information was a “significant purpose” – rather than “the purpose” – of the proposed surveillance or search.

Section 505 of the PATRIOT Act revised the standard for issuing NSLs. As originally enacted, the NSL statutes targeted an “agent of a foreign power.” Today, the FBI can issue NSLs if the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment.

Section 206 of the PATRIOT Act amended FISA to enable the government to conduct “roving” surveillance of targets whose actions thwart FISA surveillance. Previously, national security investigators had to obtain a new FISC order each time the target of electronic surveillance used a different communications service provider. With “roving” authority, the FBI can maintain reasonably continuous surveillance as a target moves from one device to another, which is standard tradecraft for surveillance-conscious terrorists and spies. This change brought FISA in line with the Federal Wiretap Act (also known as Title III), which had authorized roving surveillance in criminal cases since 1986. See 18 U.S.C. § 2518(11). When the FBI implements roving authority under FISA, it must demonstrate to the FISC, normally within 10 days, probable cause that the target is using, or is about to use, the new device. See 50 U.S.C. § 1805(c)(3).²¹

Section 215 of the PATRIOT Act amended FISA to authorize the FISC to issue orders for the production of the types of records and other tangible things that law enforcement officers and prosecutors historically have been authorized to acquire through grand jury subpoenas. See 50 U.S.C. § 1861. Previously, investigators in national security matters could secure a court order only for limited types of records by showing “specific and articulable facts” that the subject was a foreign power or an agent of a foreign power. Section 215 adopted the standard of “relevance to an authorized investigation.” 50 U.S.C. § 1861(b)(2)(A).

To obtain a Section 215 order, the government generally must show that (1) the information is sought for an authorized national security investigation conducted under guidelines approved by the Attorney General; (2) the information sought is relevant to the authorized investigation; and (3) if the investigative target is a U.S. person, the investigation is not based solely on activities protected by the First Amendment. 50 U.S.C. §§ 1861(a) and

²¹ Courts have upheld the constitutionality of roving surveillance, rejecting claims that it violates the Fourth Amendment’s “particularity” requirement. E.g., United States v. Jackson, 207 F.3d 910, 914 (7th Cir.), vacated on other grounds, 531 U.S. 953 (2000); United States v. Gaytan, 74 F.3d 545, 553 (5th Cir. 1996); United States v. Bianco, 998 F.2d 1112, 1122-23 (2d Cir. 1993); United States v. Petti, 973 F.2d 1441, 1445 (9th Cir. 1992).

(b)(2)(A). The government must adhere to minimization procedures that limit the retention and dissemination of information concerning U.S. persons. 50 U.S.C. §§ 1861(b)(2)(B) and (g).

Section 215 prohibits the recipient of a business records order from disclosing it; but the recipient may challenge its legality and any non-disclosure requirement in court. 50 U.S.C. § 1861(d). To date, no recipient of a Section 215 order has challenged its validity or a non-disclosure requirement.

4. The Intelligence Reform and Terrorist Prevention Act

When FISA was passed in 1978, the likely targets of counterterrorism surveillance were agents of an organized terrorist group like the Red Brigades, the Irish Republican Army, or the Palestinian terrorist organizations of that era. Given the increasing fluidity in the membership and organization of international terrorists, the FBI may not be able to ascertain a foreign terrorist's affiliation with an international organization. Section 6001 of the Intelligence Reform and Terrorist Prevention Act of 2004 (IRTPA) allows the government to conduct surveillance on a non-U.S. person who "engages in international terrorism or activities in preparation therefor" without demonstrating an affiliation to a particular international terrorist organization. Pub. L. 108-458, § 6001, 118 Stat. 3638, 3742 (2004).

Sections 206 and 215 of the PATRIOT Act and Section 6001 of IRTPA were scheduled to "sunset" on December 31, 2009. In May 2011, after an interim extension, Congress extended the provisions until June 1, 2015, without amendment.

5. The Communications Assistance for Law Enforcement Act

The Communications Assistance for Law Enforcement Act of 1994 (CALEA), 47 U.S.C. §§ 1001 *et seq.*, requires telecommunications providers to develop and deploy intercept capabilities in their networks to ensure that the FBI and other U.S. law enforcement agencies can conduct lawful, authorized interception and electronic surveillance pursuant to FISA and U.S.C. Title 18.

CALEA's mandate applies to "telecommunications carriers," which the statute defines as entities "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire [including those that provide] ... commercial mobile service" and any other entities that the Federal Communications Commission (FCC) finds provide a service that replaces a substantial portion of local telephone exchange service and, in the public interest, should be subject to CALEA. 47 U.S.C. § 1001(8).

In 2005, the FCC applied CALEA to providers of facilities-based broadband Internet access services and providers of "interconnected" Voice over Internet Protocol (VoIP) services. The FCC defines "interconnected" VoIP services as those that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the public switched telephone network. *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 15008 ¶ 39 (2005). The FCC held that

these services had replaced a substantial portion of local telephone exchange service and that public interest factors supported applying CALEA to these providers. *Id.* at 15001-12 ¶¶ 24-40.

CALEA imposes “assistance capability requirements” on telecommunications carriers to ensure that, in the event of court-ordered or other lawfully authorized government electronic surveillance, these carriers are capable of:

- (1) Expeditiously isolating and enabling the government to intercept all wire and electronic communications of a target concurrent with their transmission;
- (2) Expeditiously isolating and enabling the government to access reasonably available call-identifying information contemporaneously with its transmission in a manner that allows that information to be associated with the communication to which it pertains;
- (3) Delivering intercepted communications and call-identifying information to the government; and
- (4) Facilitating interception and access to call-identifying information unobtrusively and with a minimum of interference to the subscriber’s service, and in a manner that protects the privacy and security of communications and call-identifying information not authorized to be intercepted and information about the fact of the interception.

47 U.S.C. § 1002(a).

CALEA also requires “manufacturers of telecommunications transmission or switching equipment” and “providers of telecommunications support services” (as defined in the statute) to cooperate with telecommunications carriers to make available, on reasonable terms and prices, features or modifications necessary to enable the carriers to comply with assistance capability requirements. 47 U.S.C. § 1005(b).

CALEA provides a compliance “safe harbor” to carriers that comply with technical requirements or standards adopted by telecommunications industry associations or standard-setting organizations or by the FCC. 47 U.S.C. § 1006.

C. Policies and Guidelines for Counterterrorism Operations

1. The Attorney General’s Guidelines for Domestic FBI Operations

The FBI is also governed by Department of Justice and internal guidelines and policies. The Attorney General’s Guidelines for Domestic FBI Operations (AG Guidelines) were issued on September 29, 2008, pursuant to 28 U.S.C. §§ 509, 509A, 510, 533, 534 and Executive Order 12333. Although not specific to counterterrorism, the AG Guidelines are the culmination of the evolution of the FBI and its policies for domestic operations since September 11, 2001. During these years, the FBI reorganized and reoriented its programs and missions, increased focus on compliance issues, and implemented major revisions to its operational policies.

The AG Guidelines apply to FBI investigative and intelligence collection activities in the U.S., its territories, and outside the territories of all nations. They govern most FBI investigative activities in foreign nations because those activities generally arise from authorized domestic investigations. Otherwise, FBI activities in foreign nations are governed by non-superseded sections of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSIG) (2003) and the Attorney General's Guidelines for Extraterritorial FBI Operations (1993), which have not been updated since their effective dates.

The AG Guidelines set standards for information-gathering activity, affording the FBI flexibility to adapt the information sought and the methods used to the nature of the investigation and the character of the information supporting the need for investigation. The AG Guidelines define two primary levels of investigation: assessments and predicated investigations.

The AG Guidelines maintain the historical respect for the "least intrusive means" and the exercise of First Amendment and other protected rights. As an overarching control, investigators must consider and use the least intrusive feasible method under the circumstances of obtaining information that is relevant to the purpose of the assessment or investigation. AG Guidelines I.C.2. The AG Guidelines also prohibit the collection or maintenance of information on U.S. persons solely for purposes of monitoring the lawful exercise of First Amendment or other rights secured by the Constitution and investigations based solely on race, ethnicity, national origin, or religion. AG Guidelines I.C.3.

The FBI implemented the AG Guidelines through the Domestic Investigations and Operations Guide (DIOG), which became effective on December 16, 2008. A revised guide, DIOG 2.0, became effective on October 15, 2011.

Assessments. To open an assessment, an FBI Agent must identify the purpose of the assessment in writing and that purpose must be within the FBI's mission (i.e., an "authorized purpose"). No particular factual predication is required, but the basis of an assessment cannot be arbitrary or groundless speculation. Any investigative activity must be related to the purpose of the assessment. See DIOG §§ 5.1-5.3. For example, to carry out its counterterrorism responsibilities, the FBI must draw proactively on available sources of information to identify potential terrorist threats and activities. The FBI cannot wait for leads to come in through the actions of others, but must be vigilant in detecting potential threats and activities to the extent permitted by law, with an eye toward early intervention and prevention. The proactive investigative authority conveyed in assessments is designed to discharge these responsibilities.

The AG Guidelines authorize six types of assessments: the prompt and limited checking of leads that individuals or groups (Type 1 and Type 2) are or may be engaged in criminal behavior or pose a national security threat; the collection of information necessary to the evaluation of threats and vulnerabilities (Type 3) and to facilitate intelligence analysis and gathering (Type 4); information gathering for the limited purpose of identifying, vetting, recruiting, validating, and maintaining the cover or credibility of human sources (Type 5); and the collection of foreign intelligence in response to a national intelligence requirement (Type 6).

AG Guidelines II.A.3. Supervisory approval is required to open all but Type 1 and Type 2 assessments.^{3/}

The methods authorized in assessments are generally those of relatively low intrusiveness, such as obtaining publicly-available information, checking government records, and requesting information from members of the public. More intrusive techniques such as electronic surveillance, undercover operations, NSLs, pen registers, and trap-and-trace devices may not be used in assessments. DIOG 2.0 §§ 5.09, 5.10.

Predicated Investigations. Predicated investigations can be based on allegations, reports, facts, or circumstances that indicate possible criminal or national security-threatening activity, or the potential for acquiring information responsive to foreign intelligence requirements. The AG Guidelines require supervisory approval to initiate predicated investigations. AG Guidelines II.B.2.

Predicated investigations that concern federal crimes or threats to the national security are divided into preliminary investigations and full investigations. The FBI may initiate preliminary investigations based on any allegation or information indicative of possible criminal or national security-threatening activity. More substantial predication is required for full investigations. Time limits, which may be extended, are set for the completion of preliminary investigations. Full investigations may be pursued without preset limits on their duration.

Information Sharing / Intelligence Information Reports. The AG Guidelines also govern information sharing. The FBI is responsible for providing “information as consistently and fully as possible to agencies with relevant responsibilities to protect the United States and its people from terrorism and other threats to the national security, except as limited by specific constraints on such sharing.” AG Guidelines VI.D. The FBI must disseminate information in a manner that protects the privacy, civil liberties, and other legal rights of U.S. persons consistent with the Privacy Act of 1974 and other statutes, executive orders, and Presidential directives. *Id.* at VI.B. The dissemination of information acquired under FISA is subject to minimization procedures and other statutory requirements.

The AG Guidelines authorize the FBI to conduct research, analyze information, and prepare reports and intelligence assessments concerning matters relevant to authorized FBI activities, including terrorism and other threats to the national security. AG Guidelines VI.B. Under this authority, the FBI issues Intelligence Information Reports (IIRs) to share raw intelligence within the FBI and with other members of the U.S. Intelligence Community. “Raw intelligence” refers to unevaluated intelligence information, generally from a single source, which has not been fully evaluated, interpreted, or analyzed. The FBI produced 25,012 IIRs in 2010. *FBI Information Sharing Report*, 21-22 (2010).

^{3/} The original DIOG, like the AG Guidelines, authorized six types of assessments. Because Type 1 and Type 2 assessments are essentially identical, varying only in whether they involve an individual or group, DIOG 2.0 combines them and refers to them collectively as “Type 1 & 2 assessments.”

To protect privacy and other legal rights of U.S. persons, the DIOG directs that intelligence reports and assessments not contain U.S. person information if the intelligence can be conveyed without including identifying information. DIOG § 15.7.B. Threats can be reported via IIR only if the information is sufficiently detailed and reliable to serve as a basis for preventive action.

Oversight. The AG Guidelines also establish oversight mechanisms for FBI national security investigations. Oversight is accomplished through (1) a dedicated oversight section within DOJ's National Security Division; (2) a dedicated compliance office within the FBI; (3) on-site audits conducted by the FBI's Inspection Division; (4) notices and reports internally and to DOJ; (5) FISC filings; and (6) reports to the President's Intelligence Oversight Board. For example, the AG Guidelines require notifications and reports by the FBI to the National Security Division about the initiation of national security investigations and foreign intelligence collection activities in certain contexts. AG Guidelines, Introduction, VI.D. The AG Guidelines also authorize the Assistant Attorney General for National Security to request additional reports and information about those activities. *Id.*

All FBI employees are responsible for ensuring that their activities comply with the AG Guidelines, federal statutes, executive orders, and the Constitution. Several offices, including the DOJ Office of Privacy and Civil Liberties, the FBI Privacy and Civil Liberties Unit, the FBI Inspection Division, the FBI Office of General Counsel, and the FBI Office of Integrity and Compliance, are responsible for ensuring that FBI employees fulfill the responsibility to undertake activities authorized by the AG Guidelines in a lawful, appropriate, and ethical manner. A significant component of DOJ National Security Division oversight comes in the form of National Security Reviews, the in-depth reviews of national security investigations that the National Security Division and the FBI Office of General Counsel commenced in 2007. Each FBI Field Office undergoes a National Security Review every three to four years, but reviews may occur more frequently depending on the office's history of compliance.

In 2007, the FBI established the Office of Integrity and Compliance (OIC), modeled after private sector compliance programs, to ensure that national security investigations and other FBI activities are conducted in compliance with the FBI's governing authorities. OIC reports to the Director and focuses the attention of executive management on FBI operations and business processes that pose compliance risks. Through OIC, rather than reacting to problems after they occur, the FBI seeks proactively to identify legal risks and to develop policy and training to mitigate those risks.^{4/}

^{4/} We believe that OIC can and should play a significant role in proactively ensuring the FBI's compliance with its governing authorities. In Part Five, we recommend that OIC analyze and identify compliance risks associated with investigative techniques that implicate potential risks to civil liberties and privacy interests – and, upon identifying risks, request that the Inspection Division conduct an audit. We understand that OIC is currently conducting a review of reported instances of “substantial non-compliance” with the DIOG, which the Inspection Division will follow with a general audit of DIOG compliance. We believe it is critical that the FBI and, if necessary, Congress make available sufficient personnel and funds to ensure that compliance is achieved.

2. The FBI's Domestic Investigations and Operations Guide

The Domestic Investigations and Operations Guide (DIOG) implements the AG Guidelines. It is a comprehensive, 270-page collection of procedures, standards, approval levels, and explanations designed to update and consolidate policies, procedures, and guidance, and to ensure Special Agent and Intelligence Analyst activities conform to the AG Guidelines. A majority of its text is unclassified and available to the public on the FBI's website. The DIOG's purpose is to standardize policies, procedures, and guidance so that FBI criminal, national security, and foreign intelligence investigative activities are consistent and uniform when possible (for example, by adopting identical approval, notification, and reporting requirements). Many policies had appeared in the Manual of Investigative Operations and Guidelines (MIOG) and memoranda to the field, and had not been re-examined or updated in years.

The DIOG is more restrictive than the AG Guidelines, as well as applicable statutory and constitutional law, in terms of what investigative activities FBI personnel can use and how they can use them. Thus, the DIOG establishes greater overall protections for privacy and civil liberties than the law and DOJ policy require.

In accord with the AG Guidelines, the DIOG prohibits the opening of an assessment based on "arbitrary or groundless speculation"; solely on the exercise of First Amendment rights; or solely on the race, ethnicity, national origin, or religious practice of any person or group, or on a combination of only those factors. DIOG §§ 5.1 and 5.3. The DIOG also stresses the importance of oversight and self-regulation to ensure that all investigative and intelligence collection activities are conducted within Constitutional and statutory parameters.

The FBI also issues Policy Guides to provide program-specific guidance to Agents and Analysts on specific types of investigative activity. The FBI is reviewing and revising its Policy Guides to ensure that they conform to the AG Guidelines. The FBI finalized its revised Policy Guide on Counterterrorism Investigations early in 2012.

When the AG Guidelines and DIOG were adopted, the FBI launched a comprehensive training effort. The primary objective of training was to ensure that FBI personnel understood and could apply new concepts and authorities. Another objective was to reinforce existing guidelines and procedures. The FBI recognized that the introduction of the AG Guidelines and DIOG presented an opportunity to ensure that Agents and Analysts conducted their activities in a consistent and compliant manner, regardless of their location or program of assignment, and to standardize processes that had become inconsistent across Field Offices. To this end, the FBI required more than 20,000 personnel to attend 16.5 hours of live training and to take and pass a test on the DIOG. The FBI implemented a "train-the-trainer" program that deployed more than 100 Headquarters-trained instructors to its 56 Field Offices and Headquarters. These Headquarters-trained personnel then trained additional trainers in their divisions.

An FBI Inspection Division audit of assessments indicates that the training was effective. The Inspection Division audited all 3,426 Type 3 through Type 6 assessments conducted in 2009. Of the 218 errors identified, 176 (80%) occurred prior to DIOG training.^{5/}

3. Domestic Investigations and Operations Guide 2.0

When the AG Guidelines and DIOG came into force in 2008, the FBI advised Congress that it planned an extensive re-evaluation of the DIOG, including a review of the adequacy of its protections of civil rights and liberties and privacy. That re-evaluation took approximately 18 months. The FBI considered the need for each proposed revision to the DIOG, the potential risks to civil liberties and privacy rights, and the controls in place.

The FBI informed DOJ of all substantive issues and proposed revisions. Upon completing the re-evaluation, the FBI briefed its Congressional oversight committees and advocacy groups, and adopted certain suggestions received[, including advocacy community suggestions involving the FBI's Undisclosed Participation Policy (UDP).]

The FBI's re-evaluation led to strengthening the protection of civil liberties and privacy rights in some contexts. For example, DIOG 2.0 requires Type 1 & 2 assessments to be based on tips or leads. *Id.* at § 5.6.3.1. It tightens the approval requirement for [UDP and certain other FBI investigative techniques.]

^{5/} In 2010, OIG documented DIOG examination abuses and cheating by 22 FBI Agents, including supervisory personnel. OIG Oversight & Review Div., U.S. Dept. of Justice, *Investigation of Allegations of Cheating on the FBI's Domestic Investigations and Operations Guide (DIOG) Exam* (Sept. 2010). Although OIG identified reasons for this conduct, the Inspector General concluded that those reasons did not excuse the conduct. The FBI referred the 22 employees to its Inspection Division. Charges will ultimately be forwarded to the Office of Professional Responsibility for adjudication. The FBI is following established policies and processes to identify any other employees who may have engaged in inappropriate conduct. The FBI has developed a new training module for DIOG 2.0.

The FBI issued DIOG 2.0, effective October 15, 2011. An unclassified version of DIOG 2.0 is available on the FBI's public website.^{6/}

Unless otherwise indicated, this Report cites to the original DIOG because that version was in effect at the time of the matters under review.

4. Agreements with Other Departments and Agencies

The FBI's ability to share information with other government departments and agencies is governed not only by its statutory authority, but also by a myriad of agreements. For example, at the time of the Fort Hood shootings, there were more than 100 agreements and Memoranda of Understanding (MOU) between the FBI and the Department of Defense (DoD) that included provisions on information sharing.

At the time of the events under review, a 1979 *Agreement Governing the Conduct of Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation* principally governed coordination of FBI and DoD counterintelligence activities. That agreement was amended in 1996 to provide that the FBI advise DoD about counterintelligence investigative interest in persons associated with DoD.

Another MOU governs the participation of DoD personnel in Joint Terrorism Task Forces (JTTFs). That MOU addresses the sharing of information related to counterterrorism investigations with persons who are not JTTF members. DoD participants in JTTFs cannot discuss JTTF investigations or any information gathered during those investigations with any DoD personnel outside the JTTF without an FBI supervisor's approval. However, the MOU directs the FBI to facilitate sharing relevant information with appropriate DoD officials as expeditiously as possible given the constraints of a particular investigation and any law or procedure affecting release of the information.

There are legal restrictions on sharing information. For example, there are restrictions on the dissemination of grand jury information and information that would reveal sources and methods. [REDACTED] FISA limits what FISA-derived information can be shared, and FISA-required minimization procedures limit how that information can be shared. As noted in Section B.1 above, FISA allows FISA-derived information about non-consenting U.S. persons to be disseminated only if it reasonably appears to be foreign intelligence, necessary to understand foreign intelligence or assess its importance, or evidence of criminal activity.

^{6/} DIOG 2.0 also authorizes emergency departures from the DIOG without prior approval (if sought within 24 hours of the departure), § 2.7.3.; allows queries of commercial databases and state, local, and tribal law enforcement records before initiating an assessment (which can weed out unfounded complaints without resort to more intrusive methods), *Id.* at § 5.1.1; [REDACTED] and clarifies the definitions of electronic and physical surveillance. *Id.* at § 18.5.8.1.

Chapter 4

The FBI Information Technology and Document Review Infrastructure

The actions of the Agents, Analysts, and Task Force Officers who handled the Hasan information cannot be judged fairly or accurately without an understanding of their working environment – and, in particular, their technological environment. In conventional warfare, our soldiers use shoulder arms and handguns. In combating terror, those weapons have a place, but the FBI's crucial weapon is information. Our investigation revealed that the FBI's information technology and information review protocols were then, and are now, less than adequate for fulfilling the FBI's role as the premier U.S. intelligence and law enforcement agency combating domestic terror.

A. The Standard Workstation

At the time of the events at issue – and today – Agents, Analysts, and Task Force Officers (TFOs) in San Diego, Washington, and other JTTFs used desktop computers with commercial off-the-shelf word processing, spreadsheet, and other functionalities common to contemporary business enterprises (for example, Microsoft® Office, Corel® WordPerfect). These computers are linked to classified FBI networks to allow for secure email communications and shared workspace; access to specialized tools ranging from Delta (for management of confidential sources) to FISAMS (an impressive web-based tool for preparing, transmitting, seeking approval for, and tracking FISA requests); and access to FBI and certain other government databases – including, when trained and authorized, classified databases that are central to the workflow of Agents, Analysts, and TFOs working on counterintelligence and counterterrorism squads.

This multi-faceted workstation confronted users in 2008 and 2009 with a non-integrated, sometimes dated, and at times clumsy toolset rather than an integrated, user-friendly suite of tools. Users had to log in to the desktop computer, then log in separately, as necessary, to a series of discrete tools and databases, each with its own password and its own search tool (and thus, its own search methodology). Prior to the Fort Hood shootings, training on these tools and databases was limited or non-existent. Agents, Analysts, and TFOs typically learned the basics of each tool and database on the job rather than through formal instruction.

B. The Standard Toolset

1. Data Warehouse System/Electronic Surveillance Data Management System

(a) Overview

The primary database relevant to our investigation is the Data Warehouse System-Electronic Surveillance Data Management System (DWS-EDMS). Designed and developed by the FBI's Special Technologies and Applications Section (STAS), DWS is an access-controlled, text-oriented database of [information acquired through the FBI's exercise of its criminal and counterterrorism authorities and techniques (see Chapter 3).] [REDACTED]

As of July 2011, the holdings of DWS-EDMS exceeded [REDACTED] of data. [REDACTED]

[REDACTED] Its holdings increase, on average, by [REDACTED] new files – approximately [REDACTED] of data – each week.

STAS designed DWS in 2001 as a transactional database to record [communications intercepts] [REDACTED]. In the intervening years, DWS became the depository of [REDACTED] information obtained [through exercise of the FBI's governing authorities and techniques] [REDACTED]

[REDACTED] Although not designed as a warehouse database, it has become one. Thus, although it is a capable, if overburdened, tool for the conventional review of [REDACTED] [information], DWS was not originally designed for the review and management of large strategic intelligence collections [REDACTED]. It also lacks the modern hardware infrastructure needed to fulfill and preserve its functionality.

DWS was the system in place in December 2008 [when Hasan sent his first message to Aulaji] [REDACTED]. STAS upgraded the system to DWS-EDMS in February 2009. The EDMS functionality assists Language Analysts [REDACTED]

[REDACTED] STAS again upgraded the system in May 2009, by implementing a new Graphic User Interface (GUI). The prior GUI remained operational under the name DWS-EDMS Classic. Unless a distinction is appropriate, this Report discusses all three systems as DWS-EDMS.

In FBI parlance, email accounts, telephone numbers, and other targets of electronic surveillance are known as “facilities.” As of July 2011, DWS-EDMS held [REDACTED] [communications] from [REDACTED] facilities in [REDACTED] cases. [REDACTED] [Communications and other information stored in DWS-EDMS] are called “products.” [REDACTED]

[REDACTED]

FBI systems process [REDACTED] and load [acquired information] [REDACTED] into DWS-EDMS, which indexes each file's text and metadata for searching. [REDACTED]

(b) **The Interface**

To work in DWS-EDMS, the user logs in [REDACTED] [and is taken] to a Home page that contains announcements and advisories to assist users, including a list of the user's active cases with [REDACTED] [information stored in DWS-EDMS]. [REDACTED]

The primary review screen [REDACTED] is similar to a Microsoft® Outlook Mailbox. The top of the screen has a series of drop-down menus. Beneath that, on the left, is an identifier of the selected case and facility. On the right is a Filters workspace that allows the user to select filtering criteria to assist in reviewing the [REDACTED] [information]. Beneath that is a column [displaying each product] [REDACTED] much like an email Inbox.

The user can select a product for review by double-clicking it, which opens the product on the right-hand side of the screen. A workspace above the product allows the user to add notes and translations, and tag any foreign languages used. A workspace column to the left of the product provides identifying information about the product; allows filtering of products by type; and provides checkboxes for [REDACTED] [identifying] the product for [, among other things.] [REDACTED] Workflow, Translation, and Attorney-Client Privilege.

(c) **Search Capabilities**

Because of its original design as a transactional database, DWS-EDMS has limited search and information management capabilities to support the review [REDACTED] [of acquired] products. Those tools were not designed for and do not provide effective assistance for the review and management of [massive collections of information, like the collection in the the Aulaqi investigation.] [REDACTED]

DWS-EDMS search capabilities are limited. The primary search modes are by [REDACTED] [REDACTED]. Keyword searches can use wildcards (for example, bomb* to return variants such as bombs, bombers, bombed,

bombing) and Boolean operators (for example, Nidal AND Hasan to return all products using those two words, or Nidal OR Hasan to return all documents using one of those two words).

These searches are literal and return only documents containing the specified [REDACTED].

The search engine lacks [REDACTED] functionalities [REDACTED].

(see Part Two, Chapter 11 and Part Five:

Recommendations). More important, search results may be affected by the user's search technique. As discussed in Chapters 7 and 11, a "full text" search of DWS-EDMS for NidalHasan@aol.com as of November 5, 2009, returns only half of the messages at issue, while an email "participant" search returns all of them.

(d) Information Management Capabilities

Until February 2009, DWS had no tools for [tracking and correlating certain email data] [REDACTED]. A new message could be linked with an earlier message only through memory, notes, or by actively searching the system.

In February 2009, the DWS-EDMS upgrade gave users the ability to customize their Home screen by specifying [certain] Favorites, [including] [REDACTED] Favorite Cases, Favorite Products, and Favorite Tools. [REDACTED]

[REDACTED] Favorite Products allowed users to access specified products from their Home screen. Users could also activate [REDACTED] [notifications] for a specified facility [REDACTED].

[REDACTED] Users could also copy messages to a folder on the main review screen and share those messages with others with authorized access.

Prior to the Fort Hood shootings, reviewers had no direct [or automated] means of linking [certain email data with other email data] [REDACTED].

[REDACTED] To locate and review [REDACTED] [communications] between two persons, users had to search the system [REDACTED].

(e) Training

To obtain DWS-EDMS access, an Agent, Analyst, or TFO must first complete three training courses in the FBI's Virtual Academy: (1) Foreign Intelligence Surveillance Act (FISA) Section 702 Retention; (2) 2008 FISA Standard Minimization Procedures (SMP) Overview; and (3) 2008 FISA Standard Minimization Procedures (SMP) – Policy Implementation Guidelines. The Agent, Analyst, or TFO must also review the SMP Implementation Policy (0137D); Access Policy for EDMS, DWS, DaLAS and any Successor Systems (0285D); and Rules of Behavior.

None of these courses provides instruction on how to use the DWS-EDMS search tool or other functionalities.

Many Agents and Analysts – and most TFOs – did not receive training on, or access to, DWS-EDMS and other FBI databases until after the FBI’s internal investigation of the Fort Hood shootings. Even for Agents and Analysts with access before the Fort Hood shootings, there was no formal training program for DWS-EDMS; instead, most “training” occurred on the job.

(f) **Disaster Recovery Capability**

Although DWS-EDMS is one of the FBI’s primary workhorse systems, it has no “live” or “failover” disaster recovery backup. [REDACTED]

[REDACTED] System shutdown or database corruption would require [REDACTED]

2. **Other Databases**

DWS-EDMS cannot be viewed in a vacuum. Agents, Analysts, and TFOs also rely on a large number of other databases. Some databases are unique to the FBI. Others are unique to a given TFO’s home department or agency, and can be accessed only by TFOs from that department or agency. Others belong to other government departments and agencies that have agreed to allow access through FBI systems.

The FBI’s primary databases include:

Automated Case Support (ACS), which consists, in turn, of three independent structured data applications:

- The **Universal Index (UNI)**, a database of identifying information derived from FBI investigations (including subjects, witnesses, complainants, addresses, telephone numbers, and email addresses). UNI, which is accessed using a DOS-based tool that dates to the 1990s, contains more than [REDACTED] records.
- The **Electronic Case File (ECF)**, which provides for electronic filing and cataloguing of case-specific documents (serials) and information. ECF is the source of the FBI’s standardized Electronic Communication (EC), which replaced letters, faxes, and memoranda for internal communications. ECF contains more than [REDACTED] records.
- **Investigative Case Management (ICM)**, which provides for the entry and management of case information, including leads and ticklers.

Sentinel. Although central to the everyday tasks of Agents, Analysts, and TFOs – and the most frequently used FBI system – ACS is also the FBI’s most outdated system. It is being phased out in favor of an impressive Web-based successor, Sentinel.

Investigative Data Warehouse (IDW). IDW ranks second to ACS in use for investigation and analysis. IDW holds more than [REDACTED] investigative and intelligence records from the FBI (including limited data collections from ACS-UNI, ACS-ECF, and ACS-ICM), other government agencies, and outside entities – at this writing, more than [REDACTED] databases, primarily non-FBI in origin. IDW is more than [REDACTED] in size.

IDW has special tools to assist in refined searches of popular data collections [REDACTED]. Its primary search tool [REDACTED] differs significantly from the limited [REDACTED] DWS-EDMS search tool in place at the time of the events at issue.⁷¹

Data Loading and Analysis System (DaLAS). This web-based system holds data acquired by FBI Field Offices or the United States Intelligence Community (USIC) as digital evidence (for example, CD-ROMs, DVDs, hard drives, cellular phones, and raw network feeds) and scans of documents seized in counterintelligence and counterterrorism investigations. DaLAS automates data uploading, processing, and classification of these media for analysis. DaLAS then provides a searchable, central repository of that data, enabling investigators and analysts at diverse locations to collaborate on projects or cases using Bureau-approved platforms.

As of May 2011, DaLAS hosted more than [REDACTED] files totaling [REDACTED] in size. [REDACTED]

Telephone Applications. This investigative database consists of telephone transactional records (“what number called what number”) collected using authorized investigative methods.

Clearwater. This non-investigative, intelligence database provides authorized users with access to telephone numbers, email addresses, and other electronic communications transactional records and sources derived from FBI and other USIC members.

⁷¹ [REDACTED]

Guardian and eGuardian. Guardian is the FBI's terrorism threat tracking and management system. The FBI's written Guardian policy requires all personnel to enter all new terrorism-related threats, events, and suspicious activities – including new Type 1 & 2 assessments – into the system as a Guardian “incident.” Guardian thus serves as the primary database for setting leads to other Field Offices and JTTFs to open new terrorism-related assessments or investigations.

eGuardian is a secure enhancement of Guardian that shares unclassified information about terrorism-related threats, events, and suspicious activities with approved state, local, tribal, and other federal law enforcement agencies, including state fusion centers and regional intelligence centers. These agencies, in turn, can use eGuardian to report terrorism-related threats, events, and suspicious activities to the FBI and other participating agencies. The FBI reviews these reports to determine whether to create a Guardian incident and pursue an assessment or investigation.

Although Guardian is accessible to all authorized Agents, Analysts, and TFOs, larger Field Offices and JTTFs have discrete Guardian squads to assess and resolve Guardian incidents. At smaller locations, individual Agents and TFOs are assigned ongoing responsibility for Guardian incidents.

C. The Lack of Data Aggregation

The FBI possesses more than [REDACTED] investigative and intelligence databases. Agents and Analysts regularly consult more than [REDACTED] of those databases in the performance of their duties. At the time of the Fort Hood shootings, however, with a few exceptions (notably IDW), users accessed each database using a discrete interface, a discrete password, and a discrete search engine. DWS-EDMS users could not conduct a simultaneous search of that system and the contents of any other FBI or other government agency database. Although the absence of this functionality did not directly affect the FBI's handling of the Hasan information, our investigation found that planning for enterprise data aggregation and consolidating and conforming the contents of these diverse databases are vital to the FBI's ability to respond to the threat of terrorism.

Chapter 5

The FBI's Investigation of Anwar Al-Aulaqi

The United States confronts a wide range of international and domestic terror threats. As of September 2011, the FBI was pursuing nearly [REDACTED] international terrorism investigations.

The FBI prioritizes counterterrorism cases in [REDACTED] tiers. [REDACTED]

[REDACTED] [The redacted portion describes sensitive FBI investigative techniques.]

As of September 2011, there were more than [REDACTED] Tier [REDACTED] and [REDACTED] Tier [REDACTED] international terrorism investigations in progress.

The FBI acquired its information on Nidal Hasan during the course of its investigation of Anwar Nasser al-Aulaqi (sometimes spelled "Awlaki"). At the time, the Aulaqi case was [REDACTED] a Tier [REDACTED] investigation [of a suspected radicalizer/recruiter].

A. Background

Aulaqi was born on April 21, 1971, in Las Cruces, New Mexico. He attended primary and secondary school in Yemen from 1979 to 1990. He received a Bachelor of Science in Civil Engineering from Colorado State University in 1994. He then moved to San Diego, California, where he served as an imam at the Al-Ribat Mosque from December 1995 until mid-2000.

[REDACTED] [During his time in San Diego, the] San Diego JTTF opened a preliminary investigation of Aulaqi [REDACTED]

[The redacted portion describes the predicate for this investigation.]

At the beginning of 2001, Aulaqi moved to Falls Church, Virginia. He was an imam at the Dar al-Hijrah mosque in Falls Church from January 2001 until April 2002. [REDACTED]

[The redacted portion describes certain information the FBI learned about Aulaqi during this time frame.] WFO opened a full investigation. [redacted]

In March 2002, Aulaqi moved to England, where he reportedly lectured youth groups on jihad. WFO closed its investigation of Aulaqi in May 2003 for lack of evidence of a pattern of activity suggesting international terrorism. In 2004, Aulaqi moved to Yemen.

In January 2006, the WFO reopened its investigation based on [redacted]

In April 2006, the FBI transferred the Aulaqi investigation back to the San Diego JTTF. [redacted]

Later in 2006, Yemeni authorities arrested and imprisoned Aulaqi on kidnapping charges. [redacted]
Aulaqi was released from prison in December 2007.

Aulaqi is a prime example of a radicalization leader. He established and sustained an international reputation as a prolix, charismatic imam who provided Islamic guidance in English through sermons, lectures, publications, recordings, and a website. For many years, he blurred his anti-Western rhetoric with mundane religious observations and advice. Communications with Aulaqi through his website could involve simple questions about how Western lifestyles comported with or could be reconciled with the teachings of the Quran (as interpreted, of course, by Aulaqi). But his rhetoric increasingly included public statements – and exhortations of violence – against the U.S. Lectures like “Constants on the Path of Jihad” and “44 Ways to Support Jihad,” which circulated on the Internet as audio files, provided the stimulus and opportunity necessary for radicalization.

During the past two years, Aulaqi or his rhetoric may have inspired or played a role in encouraging at least four known “homegrown” U.S. radicals who took or attempted violent acts or training: Hasan, Michael Finton, Faisal Shahzad, and Zachary Chesser. For each of them, the connection with Aulaqi was virtual (although Hasan claimed to have met Aulaqi briefly in the early 2000s at the Dar al-Hijrah mosque in Falls Church, Virginia.) The FBI is not aware of any evidence that Aulaqi instructed any of these individuals to engage in violent acts.

B. The [DWS-EDMS Collection] [redacted]

In 2008, the San Diego JTTF consisted of five squads, each led by a Supervisory Special Agent (SSA): three International Terrorism squads, a Domestic Terrorism squad, and a Threat squad. In addition to the five SSAs, the JTTF included 25 FBI Special Agents, five FBI Intelligence Analysts, and 36 full-time Task Force Officers (TFOs) from 20 different federal, state, and local agencies.

[redacted] [The redacted portion describes sensitive investigative steps taken by the San Diego JTTF.]

San Diego had assigned the Aulaqi investigation to Squad CT-3 [redacted] FBI Special Agent (SA) SD-Agent and FBI Intelligence Analyst (IA) SD-Analyst, both members of CT-3, were assigned responsibility for reviewing [redacted] [information] using DWS. Their Supervising Special Agent was SD-SSA.

By 2008, Aulaqi [redacted] had established an international reputation as a popular English-speaking Islamic cleric with a prolific output of writings, sermons, and audio recordings as well as a website devoted to his teachings and his anti-Western views. At the same time, his works from the early 2000s, which provided a contemporary interpretation of Islamic matters for an English-speaking audience, were popular among a wider, more mainstream audience. Through his website, Aulaqi would answer mundane questions about Islam for Western followers on topics such as divorce and fasting during Ramadan. He appeared to understand legal limitations. He was not known directly to have instructed anyone contacting him through his website to engage in violent action.

SD-Agent and SD-Analyst believed that Aulaqi had [ambitions beyond radicalization]

[redacted] Their primary purpose was to [redacted] gather and, when appropriate, disseminate intelligence within the U.S. Intelligence Community about Aulaqi [redacted]

[redacted] Between [redacted] March 2008 and the Fort Hood shootings in November 2009, the [redacted] [Aulaqi investigation] produced approximately [redacted] leads and [redacted] investigations, as well as some [redacted] Information Intelligence Reports (IIRs). [The redacted portion describes FBI investigative strategy.]

[redacted] Visitors to [redacted] [Aulaqi's web]site could select a "Contact the Sheikh" link, which opened a web page that allowed them to type a message to Aulaqi and enter their email address. The message was not posted on the site or otherwise available for public viewing. Instead, the website automatically forwarded the message by email to al_aulaqi@yahoo.com. [redacted]

The [DWS-EDMS collection] [redacted] presented, in SD-Analyst's words, a "crushing volume" of information, confronting SD-Agent and SD-Analyst with [redacted] [thousands of electronic documents] [redacted] for review. SD-Agent spent

approximately three hours each day reviewing [this information] [REDACTED]. SD-Analyst spent about 40% of his time on the investigation.

On a typical morning in late 2008, SD-Agent and SD-Analyst would log in to DWS to review [information] [REDACTED]. SD-Analyst usually read [certain information] [REDACTED] while SD-Agent [read other information] [REDACTED]. It was not unusual, however, for both men to [read everything] [REDACTED].

[T]hrough December 17, 2008, the date of Hasan's first message to Aulaqi, [SD-Agent and SD-Analyst reviewed] [REDACTED] 12,799 [electronic documents – on average,] 1,420 [REDACTED] per month, or [REDACTED] 65 to 70 [REDACTED] per work day.

Between December 17, 2008, the date of Hasan's first message to Aulaqi, and June 16, 2009, the date of his last message [REDACTED] SD-Agent and/or SD-Analyst reviewed [REDACTED] 7,143 [electronic documents] [REDACTED] [or, on average,] 65 to 70 [REDACTED] per work day. [T]he workload could vary dramatically. As the following chart reveals,

[REDACTED] [during portions of this timeframe, SD-Agent and SD-Analyst had to review, on average, as many as 132 electronic documents per work day.]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[The redacted portion involves FBI investigative techniques and classified details about the investigation workload.]

C. The Workflow

1. [REDACTED] Identification Requirements

[REDACTED] [The FBI's governing authorities] required SD-Agent and SD-Analyst to make [REDACTED] [multiple] decisions [REDACTED] about each DWS-EDMS [electronic document, including] Attorney-Client Privilege. [REDACTED]

SD-Agent had ultimate authority for the [identifications]. [REDACTED] If SD-Analyst had questions [REDACTED] SD-Agent would make the final decision.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Workflow. Reviewers use Workflow [REDACTED] [identifications] to assist in managing and tracking products. [REDACTED]

[REDACTED]

Translation. These [identifications] [REDACTED] enable users to identify products that need translation.

[REDACTED]

Attorney-Client Privilege. These [identifications] [REDACTED] enable users to identify products that may be subject to attorney-client privilege.

[REDACTED]

[The redacted portions describe classified and sensitive FBI identification requirements.]

D. Human Factors

Research shows that trained information reviewers faced with binary decisions like those made by [SD-Agent and SD-Analyst] [REDACTED] – relevant/irrelevant, responsive/non-responsive, pertinent/non-pertinent – identify only about 75% of the relevant documents and, indeed, agree with each other's decisions only about 75% of the time.

The Text Retrieval Conference (TREC), a project co-sponsored by the National Institute for Standards and Technology and the U.S. Department of Defense, conducts comparative research on text retrieval technologies. In 2008, the TREC Legal Track assembled volunteer research teams consisting primarily of second- and third-year law students, augmented by recent law school graduates, experienced paralegals, and litigation specialists. Each reviewer assessed the relevance or non-relevance of 500 documents, at an average rate of approximately 21.5 documents per hour. In 2006 and 2007, other reviewers had judged the relevance or non-relevance of samples of the same documents. The reviewers agreed on relevance decisions only 71.3% of the time. *See* Oard, Hedin, *et al.*, 2009; Tomlinson, Oard, *et al.*, 2008; Baron, Lewis & Oard, 2007.

Other studies have found comparable levels of agreement. The Electronic Discovery Institute (EDI), a non-profit research institution that studies human and technology-assisted document review, assessed a four-month review of 1.6 million documents by attorneys for Verizon. Two new teams of attorneys conducted independent reviews of a sample set of 5,000 documents. The teams agreed on relevance decisions only 70% to 76% of the time. *See* Roitblat, Kershaw & Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, J. AM. SOC. INFO. SCIENCE & TECH. 61(1):70-80, January 2010; *see also* Barnett, *et al.*, *Machine Learning Classification for Document Review*, XEROX RESEARCH CENTER EUROPE/XEROX LITIGATION SERVICES, 2009.

Although differences in the background and experience of reviewers, as well as extrinsic and random factors (for example, inattention, distraction, fatigue, or illness) can produce variations in accurate decision-making about the relevance [REDACTED] of information, other primary factors include the nature of language; reviewer workload; the size and pace of information collection; the complexity of the information under

review; the [redacted] [identification] requirements; the available information review and management tools; the available computer technology and infrastructure; training; and the availability of managed quality control.

E. The Language Barrier

The inherent ambiguity of language and the presence of jargon, idiom, foreign languages, and code challenge even the most capable reviewers and search technologies. A classic study measured the accuracy of attorneys and other experienced review professionals in conducting computer-assisted searches of 40,000 documents in order to determine their relevance or non-relevance to a train accident. See Blair & Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 28 COMM. ACM 289 (1985). Although the reviewers estimated that their search methodology had identified more than 75% of the relevant documents, they located only about 20%.

The disparity resulted from the myriad of ways in which the documents used the English language; for example, describing the accident as an "incident," "disaster," "event," "situation," "problem," and "difficulty." The study concluded: "It is impossible difficult for users to predict the exact words, word combinations, and phrases that are used by all (or most) relevant documents and only (or primarily) by those documents." Blair & Maron, at 295.

The potential involvement of foreign languages only exacerbates the challenges for FBI reviewers. Because of Aulaqi's U.S. origin and celebrity as an English-speaking imam, the [redacted] communications at issue are almost entirely in English, with occasional Arabic salutations, references, and quotations from the Quran. As a result, these communications did not confront reviewers with an ongoing need for translation services, which can delay access to products and complicate searches.^{8/}

F. The "Trip Wire"

The Aulaqi [investigation] [redacted] also served as an occasional "trip wire" for identifying [redacted] persons of potential interest [redacted]. When SD-Agent or SD-Analyst identified such a person, their typical first step was to search DWS-EDMS and other FBI databases for additional information [redacted]. If the [redacted] [person] was a U.S. Person or located in the U.S., SD-Agent might set a lead to the relevant FBI Field Office. If the information was believed valuable to the greater intelligence community and met one of the FBI's intelligence-collection requirements, SD-Analyst would disseminate it outside the FBI in an IIR. Indeed, section 1.7 of the FBI Intelligence Policy Manual requires dissemination of intelligence that has the potential to protect the U.S. against threats to national security or improve the effectiveness of law enforcement. See FBI Intelligence Information Report Handbook § 4.1.2; *Privacy Impact Statement for the FBI*, FBI Intelligence Information Report Dissemination Systems (FIDS) § 1.1 (July 2, 2010).

^{8/} We heard anecdotal evidence of a lack of sufficient human translation resources. [redacted] Although developers have achieved remarkable advances in auto-translation, computers are not yet adequate substitutes for translators.

Chapter 6

The FBI's Assessment of Nidal Malik Hasan

A. San Diego: December 17, 2008 – January 7, 2009

On December 17, 2008, Nidal Hasan tripped the wire. He visited www.anwar-alawlaki.com. Using the website's "Contact the Sheikh" tool, he wrote a message to Aulaqi that included a personal email address, NidalHasan@aol.com. The website transferred that message by email to al_aulaqi@yahoo.com. [REDACTED] [The FBI acquired the] email and uploaded it to DWS.

[REDACTED] SD-Analyst reviewed Hasan's message to Aulaqi, which read:

Nidal Hasan wrote:

Assalum Alaikum Wa Rhahmutallahi Wa Barakatu,

There are many soldiers in the us armed forces that have converted to Islam while in the service. There are also many Muslims who join the armed forces for a myriad of different reasons.

Some appear to have internal conflicts and have even killed or tried to kill other us soldiers in the name of Islam i.e. Hasan Akbar, etc. Others feel that there is no conflict.

Previous Fatwas seem vague and not very definitive.

Can you make some general comments about Muslims in the u.s. military.

Would you consider someone like Hasan Akbar or other soldiers that have committed such acts with the goal of helping Muslims/Islam (Lets just assume this for now) fighting Jihad and if they did die would you consider them shaheeds.

I realize that these are difficult questions but you seem to be one of the only ones that has lived in the u.s. has a good understanding of the the Qur'an and Sunna and is not afraid of being direct.

Jazaka'Allah Khair.

This message and most of the messages and emails that followed contain misspellings and other typographical errors. We present all texts in their original form, without corrections.

SD-Analyst brought the message to SD-Agent's attention. SD-Agent [REDACTED] [identified] the email as a "Product of Interest." He traced the IP address to Reston, Virginia. (An IP address is a unique identifier assigned to a Transmission Control Protocol/Internet Protocol (TCP/IP) host – for example, a computer or mobile phone – when it connects to the Internet or a network. In theory, tracing ("resolving") an IP address should identify the Internet Service

Provider for, and geographic location of, the computer or other device used to send or receive an email or to visit a website.)^{9/}

Because the message referenced the U.S. military and its IP address resolved to Northern Virginia, SD-Agent contacted DoD representatives on the San Diego JTTF to help assess the communication. He emailed the message to three Task Force Officers (TFOs): Naval Criminal Investigative Service (NCIS) Special Agent SD-TFO1 and NCIS Intelligence Analyst SD-TFO2, who served on CT-3; and DCIS Special Agent SD-TFO3, who served on another counterterrorism squad. SD-Agent's email included the full text of Hasan's message and noted:

Here's another e-mail sent to Aulaqi by a guy who appears to be interested in the military. The header information suggests that his name is "Nidal Hasan", but that might not be true. The IP address resolves to Reston, VA. Here's the full text of the message:

...

Can we check to see if this guy is a military member? Also, I would like your input, from the military standpoint, on whether or not this should be disseminated further. Thanks,

SD-TFO3 joined the San Diego JTTF in 2008. He did not know that DWS-EDMS existed until after the shootings. At that time, he learned that less than half of his squad – including Agents, Analysts, and TFOs – had ever heard of DWS-EDMS. He received training on the system in January 2010. As of the date of our interview in 2011, he had not had an investigative need to request access.

SD-TFO1 joined the San Diego JTTF in 2008. He knew about DWS, but at that time, a common practice was to ask IAs with DWS access to search [REDACTED] [information from acquired communications]. He received access to DWS-EDMS in December 2009 and received mandatory training in 2010.

SD-TFO2 joined the San Diego JTTF full-time in 2006; she received training on DWS-EDMS in April 2009, but did not have access until December 2009.

SD-TFO3 searched for "Nidal Hasan" in the Defense Employee Interactive Data System (DEIDS) and other DoD databases, without success. On December 19, 2008, he advised SD-Agent that Hasan was not a member of the military.

^{9/} The FBI uses IP addresses as a guidance tool, not an identifier. IP resolution is an imprecise and often meaningless inquiry. Unrelated persons could be assigned the same IP address at different times during the day on different computers, notably when using public hubs (for example, an Internet café or coffee shop) or if their service provider uses dynamic IP allocation, which assigns IP addresses temporarily and changes them each time a customer logs on. Moreover, knowledge that IP addresses leave a digital footprint has led [REDACTED] [wrongdoers] (notably child pornographers) to use anonymizers and other techniques or tools to thwart IP address searches.

On January 1, 2009, Hasan sent a second message to Aulaqi through the website. [REDACTED]
[REDACTED] SD-Analyst and SD-Agent reviewed that message. Its full text read:

Nidal Hasan wrote:

Assalam Alaikum Wa-RhamatuAllahi Wa-Barakatu,

Imam, It seems as though Iran is the only government that is not afraid to openly voice its discontent in a straight forward and firm way. I am curious about your opinion in regards to Israeli catalyzing unity [sic] among all Muslims regardless of specific religious difference. Additionally, is it better for Muslims to say I am just Muslim and not Sunni or shia which seems to divide us.

Jazak-Allah Khair.

SD-Agent [REDACTED] [identified] this message as "Not a Product of Interest."

On January 7, 2009, SD-TFO2 emailed SD-Agent:

[SD-Agent],

Though [SD-TFO3]'s research indicates that Nidal is not a military member, I still think this would make a good [Intelligence Information Report]. There might be other information out there that links him to the military in some way. [REDACTED]
[REDACTED]

Please let me know if it goes out in an IIR. I'll see if my HQ can eval it.

[SD-TFO3]-did you check to see what other Hasan's are in the military?

[REDACTED] If not, I can have our guy run just the last name.

[The redacted portion involves classified and sensitive FBI investigative information.]

Later that day, after additional checks in DEIDS and other databases, SD-TFO3 located an active duty U.S. Army officer named Nidal Malik Hasan assigned to Walter Reed Army Medical Center in Washington, D.C. He informed SD-Agent of Hasan's probable identity and gave him a print-out of the DEIDS record. The DEIDS record abbreviated "Commissioned Officer" as "Comm Officer." SD-TFO3 misinterpreted the abbreviation to mean "Communications Officer."

SD-Agent searched DWS to determine whether Aulaqi had responded to Hasan's December 17, 2008, message. He had not. However, the search returned Hasan's January 1, 2009, message. SD-Analyst traced its IP address to Washington, D.C. (SD-Agent performed a "participant" search of DWS, rather than a full text search; otherwise, DWS would not have found the second message.)

SD-Agent and SD-Analyst discussed issuing an IIR about Hasan's messages. Given his understanding that Hasan could be a Communications Officer, SD-Agent feared that Hasan might have access to IIRs and thus could learn about the Aulaqi [investigation.] [REDACTED] SD-Agent decided not to issue an IIR.

SD-Agent prepared, and SD-SSA approved, an Electronic Communication (EC) setting two leads.

A lead is "a request for investigation to assist in bringing a case to a logical conclusion." Manual of Administrative Operations and Procedures (MAOP) § 10.2.9(1). Then-existing FBI policies identified three types of leads: Action Required, Discretionary Action, and Information Only. "Action Required leads are used if the sending office requires the receiving office to take some type of action.... Discretionary Action leads are used if the sending office has some information that may be of importance to the receiving office. These leads may or may not require action by the recipient, and the recipient will decide what, if any, action to take.... Information Only leads are used for information only and when no specific action is required or necessary." MAOP § 10.2.9(1)(a)-(c).

The Manual of Investigative Operations and Guidelines (MIOG), Part II, § 16-1.4(2) also required the originator of a lead to assign "precedence designators" to each addressee. These designators specified the desired speed of response: Immediate, Priority, or Routine. The Manual instructs the originator of a lead to:

- (b) Use the Immediate designator when addressee(s) must take prompt action or have an urgent need for the information....
- (c) Use the Priority designator when addressee(s) must have the information or take action within 24 hours....
- (d) Use the Routine designator when addressee(s) must have the information in the normal course of business.

SD-Agent had set prior "trip wire" leads to other JTTFs from the Aulaqi [investigation] [REDACTED]. Each had been a Routine Discretionary Action lead.

San Diego's EC (inadvertently dated January 7, 2008, rather than 2009) set a Routine Discretionary Action lead to the Washington, D.C., Field Office (WFO) because Nidal Malik Hasan appeared to be living or working in its Area of Responsibility. San Diego set the lead "For action deemed appropriate. San Diego requests that WFO notify San Diego if any action is taken based on this information."

The EC provided basic information about Aulaqi and San Diego's investigation, then set forth the complete text of Hasan's two messages and advised that Aulaqi had not responded. The EC described Hasan's possible military status and provided his home address and telephone number. The EC concluded:

While email contact with Aulaqi does not necessarily indicate participation in terrorist-related matters, Aulaqi's reputation,

background, and anti-U.S. sentiments are well known [REDACTED]. Although the content of these messages was not overtly nefarious, this type of contact with Aulaqi would be of concern if the writer is actually the individual identified above.

[The redacted portion involves classified and sensitive FBI investigative information.]

SD-Agent emailed copies of the lead to SD-TFO1, SD-TFO2, and SD-TFO3.

Under written FBI policy, "the recipient will decide what, if any, action to take" on a Discretionary Action lead. MAOP § 10.2.9(1)(a)-(c). SD-Agent expected WFO to take investigative action, including, at the least, contacting DoD and conducting an interview of Hasan, presumably using a pretext. However, San Diego's principal target was Aulaqi, and SD-Agent did not view the Hasan information as important to, or something that would further, the Aulaqi investigation. He did not plan to monitor the lead or follow WFO's actions, if any, in response.

The EC also set an Information Only lead to a Headquarters unit – International Terrorism Operations Section (ITOS) 1, Continental United States (CONUS) 6 – to "read and clear" the EC. ITOS 1 supports, coordinates, and oversees all FBI CONUS-based international terrorism investigations. CONUS 6 is the ITOS 1 unit with regional responsibility for overseeing intelligence collection and investigative efforts by the San Diego JTTF. ITOS1-SSA, ITOS1-Analyst, and ITOS1-Agent received the EC at ITOS 1, CONUS 6. SD-Agent's cover email to these personnel stated:

This one is for WFO. The individual is likely an Army communications officer stationed at Walter Reed. I would recommend that this not be disseminated as an IIR, since he may have access to message traffic. If this needs to get to the military, WFO might have to do it internally.

Because the available information did not decisively define a terrorism-related threat – and because San Diego set the lead as part of an ongoing investigation – Guardian policy did not require San Diego to create a Guardian incident.

SD-SSA left San Diego in January 2009 to become Assistant Special Agent in Charge (ASAC) [of another FBI office] [REDACTED]. SD-Agent became the acting Supervisory Special Agent for CT-3 on or about January 19, 2009, and held that position until mid-July 2009. His supervisor in that position was the Counterterrorism ASAC of the San Diego Field Office.

B. Washington, D.C.: January 7, 2009 – February 25, 2009

The Counterterrorism Division in the Washington Field Office includes several FBI-only counterterrorism squads, as well as the Washington, D.C., JTTF (WFO). In 2009, the JTTF at WFO consisted of four squads, each led by an FBI Supervisory Special Agent (SSA): an International Terrorism squad (CT-1), a Guardian squad, a Domestic Terrorism squad, and the

National Capital Response squad. CT-1 consisted of 12 FBI Special Agents, 10 TFOs, one IA, and its SSA, WFO-SSA.

No FBI written policy specifies which office has ultimate responsibility for inter-office leads. In practice, the receiving office owns the lead. That office is responsible for conducting an assessment/investigation in response to the lead and determining what, if any, additional investigative steps are warranted. As a matter of practice, WFO thus owned the Hasan lead and bore ultimate responsibility for its outcome.

SD-Agent set the lead to WFO CT-1 on January 7, 2009. The FBI has no written policy on when the receiving office should assign a lead set by EC. (In comparison, FBI policy requires that supervisors assign Guardian-based assessments within five business days of receipt.)

WFO-SSA did not review and assign San Diego's lead until nearly two months later, on or about February 25, 2009. The delay may have been caused, in part, by WFO's focus on imminent threats relating to the election and inauguration of President Barack Obama.

According to FBI statistics, WFO CT-1 covered [REDACTED] leads in 2009 – on average, [REDACTED] leads per squad member.

C. San Diego: January 7, 2009 – February 25, 2009

Between January 7, 2009, and February 25, 2009, [SD-Agent and SD-Analyst reviewed at least 3,000 electronic documents in the Aulaqi investigation.] [REDACTED] Hasan sent six [messages to Aulaqi] [REDACTED]. Aulaqi responded to Hasan twice. SD-Agent and SD-Analyst were the only FBI personnel who reviewed these emails. They did not associate these messages with Hasan's initial messages or the lead.

At the time San Diego set the Hasan lead, DWS had no [REDACTED]
[REDACTED] [capability for tracking and correlating certain email data. A new message could be linked with an earlier message only through memory, notes, or by actively searching the system] (see Part Two, Chapter 11).

Because of these shortcomings, Agents, Analysts, and TFOs had to track [and correlate certain email data] [REDACTED] outside of the system. SD-Agent relied primarily on memory and notes for this purpose. SD-Analyst used an Excel spreadsheet. He did not add Nidal Hasan or NidalHasan@aol.com to his spreadsheet. (Although SD-Analyst also used Favorites to track email addresses of interest, those functionalities were not available until well after San Diego set the Hasan lead.)

On January 16, 2009, Hasan sent his third message to Aulaqi through the website application:

Nidal Hasan wrote:

Assalamu Alaikum, Please comment if my flow of logic is correct.
JazakAllah Khair,

Is it Permissible to Fire Unguided Rockets into Israel
There is no question that firing unguided rockets into Israel has the potential of indiscriminately killing civilians. The real question is why Hamas would do such a thing. Can one envision a scenario where it would be acceptable to so. Well, what if Israel was and continues to indiscriminately kill and hurt civilians and commit other atrocities in the Gaza territory to serve their expansionary ambitions. One can then begin to at least understand why the Palestinians would do such a thing. In fact it is probably one of the only things they can do to in an attempt to avenge themselves and repulse the enemy.

Realistically it's akin to a mosquito attacking a man i.e. it's uncomfortable and annoying but not a real threat. One may consider the firing of missiles into Israel a transgression in the eye of Allah (SWT) because of its indiscriminate nature. However, if one recalls the verse about the permissibility of transgressing albeit a different scenario I believe it still applies. Verse 2:194 states ""The sacred month is for the sacred month, and for the prohibited things, there is the Law of Equality (Qisas). Then whoever transgresses the prohibition against you, you transgress likewise against him. And fear Allah (SWT), and know that Allah (SWT) is with Al-Muttaqun. Other verses that seem to apply include the following.

1. And those who when an oppressive wrong is inflicted on them (are not cowed but) help and defend themselves. (42:39)
2. The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation his reward is due from Allah: for (Allah) loveth not those who do wrong. (42:40).
3. But indeed if any do help and defend themselves after a wrong (done) to them against such there is no cause of blame (42:41).
4. The blame is only against those who oppress men with wrongdoing and insolently transgress beyond bounds through the land defying right and justice: for such there will be a Penalty grievous. (42:42)

Aulaqi did not respond. Two days later, on January 18, 2009, Hasan sent a lengthier message discussing how the Western world views Hamas.

Nidal Hasan wrote:

Assalamu Alaikum Sheikh Awiaki,

I know your busy but please comment if the logic of this piece is accurate. am a novice at this and would like reassurance.

May Allah (SWT) reward you.

Hamas is a democratically elected Islamic organization that is trying to establish the law of God in their land. That is why they, as well as other Islamic countries are hated by the West. The Muslims should know that Hamas and other sprouting Islamic states will make mistakes and is not going to be perfect in the implementation of Shariah. The west will be sure to point these deficiencies out. However, the believers have mercy on the believers and are firm against the non-believers. Not the other way around. How is it that Israel and the U.S. can get away with so much in the way of the mischief that they create on the earth but if any Islamic group makes an error, they are ripped apart by the enemies of Islam, some of which call themselves Muslim. With that said, Hamas should be given the benefit of the doubt if any doubt exists in regards to their strategy of rocket firings in an attempt to repel the enemy. To the rest of the Muslim world the believers ask, how is it that while the weak and the oppressed men, women and children in Gaza are pleading: "Our Lord, rescue us from the people of this tyrannous country, and appoint for us a protector from you, and appoint to us, a helper from you, that no one comes to help. Where are the Muslims? So unlike those Islamic states that seem to be choked up when an oppressive wrong is inflicted on the Muslims, Hamas helps and defends its own Muslim people. The Palestinians have sanction to fight because they have been wronged and have been driven from their homes unjustly just because they are endeavoring to be a God abiding state and won't submit to the enemy. And although they have full right to implement the concept of an "eye for an eye" or "injury for injury" and punish the Israelis with the like of that wherewith they are being punished, in reality Hamas seems to be more similar to mosquitoes bothering a camper on a hot summer day. More of a nuisance than an actual threat as measured by the number of casualties and damage those rockets have produced. Even if the Palestinians did forgive and forget the atrocities of the unjust killings of innocent men, women, and children, Israel would continue its transgressing oppression. Hamas and other Islamic countries believe death is better than oppression and do not to fear the blame of the blamers. The blame is only against those Zionists who oppress men with wrong-doing and insolently transgress beyond bounds through the land defying truth and justice and will be held accountable. Hamas, after mutual consultation among their fellow Muslims, seeks to make ready against the Israelis what ever force and war mounts they can muster, so that they may strike terror into the hearts of their enemies and the enemy of God. Even if all that amounts to is annoying rockets that render no real damage. Their goal is to be left alone, which can only be done by ridding themselves of Israeli aggression, blockades, and oppression. Again, the Palestinians could forgive the Zionist regimen but that wouldn't stop the oppression and is thus a mute point. On top of that, the Western world makes clear that it does not want Islamic rule to prevail. Again~ they make that quite clear; not only in their own lands but in the lands of the Muslims as witnessed by their mighty plotting around the world. So in the case of Israelis reckless aggression that costs the lives of innocent women,

children, and men, the law of retribution applies. It's a matter of survival. If a country used a nuclear weapons on a country with the intent of destroying it, it would reciprocate in a similar manner hoping it would survive. Hamas and the Muslims hate to hurt the innocent but they have no choice if their going to have a chance to survive, flourish, and deter the Zionist enemy. The recompense for an evil is an evil. So, to claim that these rocket attacks go against the spirit of Islam is false. The blame is only against those who oppress men wrongly and insolently transgress beyond bounds through the land defying truth and justice. When the enemies of Allah (SWT) tried to use the Islamic teachings against prophet Muhammad (SAWS) he uprooted those palm trees and defeated them. Even if Hamas and other budding Islamic nations do not make sound decisions at times one would expect Allah (SWT) to forgive them based on their intentions to please him by establishing and defending a country that envisions obedience to Allah (SWT). A good example of this is when an expedition to attack the Meccan caravan during a holy month was made by mistake, Allah (SWT) revealed that it was a grave sin but he not only forgave them but rewarded them further stating that disbelieving in him (SWT) was an even greater sin as a warning to the non believers. Again, Hamas and other Islamic nations use different strategies to defend their land. As they mature through this difficult process they need support from the believers and expect Muslims to suspend their critical judgment and make prayers to Allah (SWT) to help them.

Aulaqi did not respond. SD-Agent [REDACTED]

[REDACTED] [identified each email as] "Not a Product of Interest" because they contained [REDACTED]

On February 16, 2009, Hasan again wrote to Aulaqi using the website application:

Nidal Hasan wrote:

Please have alternative to donate to your web site. For example, checks/money orders may be sent to .

This can assure privacy for some who are concerned.

Jazaka-Allah-Khair

About a minute later, Hasan sent a second, similar message:

Nidal Hasan wrote:

Assalam Alaikum Wa-RhamatuAllahi Wa-Barakatu,

Please have alternative methods to donate to your web site. For example, checks/money orders may be sent to .

This can assure privacy for some who are concerned and maximize the amount given.

Jazaka-Allah-Khair

About twenty minutes later, Hasan sent a third message to Aulaqi, this time about a \$5,000 scholarship:

Nidal Hasan wrote:
Assalam Alaikum Wa-RhamatuAllahu Wa-Barakatahu Imam,

InshAllah, A \$5,000.00 scholarship prize is being awarded for the best essay/piece entitled "Why is Anwar Al Awlaki a great activist and leader".

We would be honored if you would award the prize. If you have any questions, concerns, or potential modifications, please e-mail me.

Advertisement will be posted in the Muslim link, in the March 2009 issue.

Jazakallah Khair, ViR Nidal PS-We met briefly a very long time ago when you were the Imam at Dar al Hijra. I doubt if you remember me. In any case I have since graduated medical school and finished residency training.

SD-Analyst reviewed all three messages [redacted] and [identified] them "Not a Product of Interest." [redacted] [The next day] SD-Agent changed the [redacted] [identification] on the third message to "Product of Interest."

On February 19, 2009, Aulaqi responded for the first time to Hasan. He sent an email to NidalHasan@aol.com, the address included in Hasan's messages:

Assalamu alaykum Br Nidal,

I pray this message reaches you at the best state of emaan and health. Jazakum Allahu khairan for thinking good of me. I don't travel so I wont be able to physically award the prize and I am too "embarrassed" for a lack of the better word to award it anyway.

May Allah assist you in your efforts.

Assalamu alaykum
Your Brother
Anwar Awlaki

Aulaqi sent the email using the address al_aulaqi@yahoo.com. Later that day, Hasan replied to that address:

Al-Hamdu-leelah,

It's nice to hear your voice even if its email.

Unfortunately, when I sent the e-mail to you everyone was giving me the green light with tentative reassurances. Everything was in the process to launch the essay contest in time for the upcoming

issue of the Muslim link. Now, obstacles have been placed by Muslims in the community that are petrified by potential repercussions. Allah willing everything will work out in such a way that pleases Allah (SWT). You have a very huge following but even among those there seems to be a large majority that are paralyzed by fear of losing some aspect of dunya. They would prefer to keep their admiration for you in their hearts. In any case, my personal experiences have taught me that if you align yourself to close to Allah (SWT) you will likely not have many friends but plenty of hardships. Even the Prophets use to say when is the help of Allah (SWT) coming. May Allah (SWT) elevate those that please him and render useless the efforts of those that displease him; and ensure that we both are those that please him....ameen.

PS: If you need any assistance, Allah willing I will be able to help. I believe my biggest strength is my financial situation. Of course, and this goes without saying, that everything should be legal and in accordance with the u.s. Law and Allah (SWT) knows best and is the best disposer of affairs and ultimately decides between truth and falsehood. InshaAllah, Allah (SWT) forgives us for our short coming, forbids are body from touching the Hell-Fire, allows plenty of shade on the day of reckoning, and hastens our entrance into Jannah where we will see each other (in Jannah) sipping on non-intoxicating wine in reclined thrones and in absolute and unending happiness. PS: I'm looking for a wife that is willing to strive with me to please Allah (SWT). I will strongly consider a recommendation coming from you.

Jazaka-Allah-Khair, Sincerely, Nidal Hasan SoA(SWT), MD, MPH

SD-Agent reviewed both messages [REDACTED] and [identified] them "Not a Product of Interest."

On February 22, 2009, Aulaqi again emailed Hasan:

Assalamu alaykum Br Nidal,
Believe it or not I kind of felt that the contest would end up running into red tape. People in that part of the world are becoming very timid and it doesn't look it's getting any better. Thanks for the offer for help. Well it is needed but I just don't know how to do it. There are poor people, orphans, widows, dawa projects, and the list goes on. So if you have any ideas on how to get help across and in accordance to law in a climate that is strict to start with please let me know.
Tell more about yourself. I will keep an eye for a sister.

Assalamu alaykum
Anwar

Hasan replied by email that day:

Alaykum salam wa-rhamatullallah! wa-barakatu,

I will keep trying. If Allah (SWT) wants something to occur no one can stop it. My job is to put the effort and have patience. Your various works force the controversial issues to surface and be addressed. If there is going to be a resolution between Islam and the West the difficult issues have to be brought up.? I think this is important. It may take many generations before people realize the gift that Allah (SWT) has given them through your work. But, I see the value now and don't have to wait for your death.

In regards to pleasing Allah (SWT) I, with his mercy, am already involved in giving to the poor, orphans, widows and dawa projects. They are usually connected with the Muslim Community Center in Silver Spring MD but I do alot of work by myself because of the rigid criteria they have for giving to the poor and needy. Whether its time or money I truly believe Allah (SWT)? gives it all back and more. My goal is Jannat Firdaus and I praise and thank Allah (SWT) for giving be the ability to strive, to see the truth, to beg for his forgiveness, and ask for his guidance. If people truly understood the peace they could have by really believing that Allah (SWT) is in control and that he is just testing to see who is the best amongs us, it would be alot' easier to see through Shaitans promises of poverty and destruction.? I want to be with those who are the best. Imam, if you have any specific projects that you feel are important to get on their feet let me know. I will read up on them and Inshallah I will please Allah (SWT). In regards to a sister for marriage. My name is Nidal Hasan. If you google "CSTS and Nidal Hasan" you will see a picture of me. I currently reside in Silver Spring MD; 301-547-1599. I was born and raised in the U.S .. Both, of my parents are from Palestine but have both passed away (yaAllah-arhamhum). I joined the U.S. military at age 17 as an infantryman. I subsequently received a BS in Biocehmistry, Degree in medicine with residency training in psychiatry, and am just finishing up my fellowship training in Disaster and Preventive Psychiatry. During my workig career I have been a bus boy, a dishwasher, a cook, a cashier, a lab technician, a researcher, and entrepreneur. Allah (SWT) lifted the veil from my eyes about 8-9 years ago and I have been striving for Jannat Firdaus ever since. I hope, Inshallah, my endeavor will be realized. If you know someone that you feel that will be compatible and complement my endeavors to please Allah (SWT) please let me know.

Assalumu Alaykum,
Nidal

SD-Analyst reviewed these two messages [REDACTED] [and identified] each of them "Not a Product of Interest."

Aulaqi sent no further personal email messages to Hasan.

D. Washington, D.C.: February 25 – 26, 2009

FBI Supervisory Special Agent WFO-SSA supervised CT-1, a [REDACTED] squad in the WFO JTTF. On or about February 25, 2009, he read San Diego's Discretionary Action lead on Hasan. Because Hasan was apparently in the U.S. military, WFO-SSA sent an EC on February 25, 2009, assigning the lead to WFO-TFO, a DCIS Special Agent who had joined the WFO JTTF in 2007. WFO-SSA also placed a paper copy of the lead on WFO-TFO's office chair.

WFO-SSA instructed WFO-TFO to conduct an "assessment." He gave him no other instructions. He did not impose a deadline. He expected WFO-TFO to take action within a reasonable time.

At that time, no written FBI policy set a deadline for completing work on Routine leads. Because FBI supervisors reviewed work assignments at quarterly file reviews, informal FBI policy required work on Routine leads to be completed within ninety days. (By comparison, FBI written policy requires that "[e]very attempt must be made to 'mitigate' Guardian incidents within the first 30 days" after assignment. [REDACTED] [FBI policy number redacted]

On May 27, 2009, the ninetieth day after the lead was assigned, WFO-TFO read the lead. During the ninety days between February 25 and May 27, 2009, Hasan communicated with Aulaqi five more times.

E. San Diego: February 25, 2009 – May 27, 2009

On February 28, 2009, Hasan sent Aulaqi an email attaching a document titled "Public Opinion in the Islamic World on Terrorism, al Qaeda, and U.S. Policies," and dated February 25, 2009. Hasan wrote:

Assalam Alaikum Wa-Rhamatu-Allahi Wa-Barakatu,

This well done survey sponsored by the U.S. government through the University of Maryland shows that most Muslims feel that US is trying to undermine Islam. It substantiates an earlier study it did as well as other studies by other organizations. I think you will find it interesting. V/R Nidal

Aulaqi did not respond. [REDACTED] [SD-Agent identified] this email as "Not a Product of Interest." That day, Hasan sent Aulaqi a link to a news article about Imam Yayha Hendi of the Islamic Society of Frederick, Maryland. Hasan wrote:

FYI: He is well known in the Greater Washington Area and serves the U.S. military as Imam for the Bethesda medical center. ?A true vision of what the government views as a good role model for all Muslims.

<http://your4state.com/content/fulltext/?cid=53341>

SD-Agent [redacted] [identified] this email as a "Product of Interest." [redacted]
 [redacted] [He also identified] it "Reasonably Appears to be Foreign Intelligence"
 because he initially believed that [redacted].

On March 3, 2009, Hasan emailed Aulaqi

Assalam Alaikum Wa-Rhamatu-Allahi Wa-Barakatu Anwar,
 Please tell me the full amount that you would need to secure the
 domain fee, etc for the time period specified. I have already
 sent a previous request asking that different payment methods be
 used so that the full amount goes to your website and no one gets
 a cut. If you don't have an alternative and don't intend to get
 one please let me know and I can send it through PayPal.
 Jazakallah Khair,
 Nidal

Aulaqi did not respond. SD-Analyst [redacted] [identified] this email as a "Product of
 Interest," but "Non-Pertinent." [redacted]

On March 7, 2009, Hasan wrote Aulaqi again:

I know your busy. Please keep me?in your rolodex in case you find
 me useful and?feel free to call me collect. I ask Allah (SWT) to
 honor those that please him in this life and the next and to
 render the efforts useless of those who strive against the most
 Gracious. InshAllah we will see each other later.

PS: I really enjoyed the story about the?brave person?who stated
 "I dont fear any man" but Prophet Muhamad (SAW) said you will
 tremble when you see this man and when he saw the man he indeed
 trembled.

Jazakallah Khair, Nidal Hasan, MD, MPH
 9304 Cedar Lane
 Bethesda Maryland
 20814 (301) 547-1599

Aulaqi did not respond SD-Analyst [redacted] [identified] this email as "Reasonably
 Appears to be Foreign Intelligence" because [redacted]
 [redacted]

Almost two months passed before Hasan wrote to Aulaqi again.

On May 17, 2009, the U.S. Army promoted Hasan from Captain to Major.

On May 25, 2009, Hasan visited Aulaqi's website and posted a new message, which the
 website automatically forwarded to al_aulaqi@yahoo.com. We do not know why Hasan used
 the website instead of the email address Aulaqi had disclosed to him. By that time, the website
 had been updated, and the messages were rendered in a different format when emailed. The
 message read:

Your name: Nidal Hasan
 Email: NidalHasan@aol.com

Message:
 Brother Anwar don't fear the blame of the blamers!

When I read this verse (below) I think of you. Most of us have turned back for fear or the for zina of this life. We have thus suspended our critical Judgment for a small price.

Allah (SWT) makes it clear that most wont believe and of those that do; the ones who struggle for his cause are greater in his sight then those who sit back and pray.

O you who believe! Whoever from among you turns back from his religion (Islāḥ), Allāḥ will bring a people ([like Anwar Al Awlaki] whom He will love and they will love Him; humble towards the believers, stern towards the disbelievers, fighting in the Way of Allāḥ, and never fear of the blame of the blamers. That is the Grace of Allāḥ which He bestows on whom He wills. And Allāḥ is AllSufficient for His creatures' needs, All-Knower.

Your Brother Nidal

Aulaqi did not respond. [REDACTED] SD-Analyst [identified] this email as "Not Pertinent" and "Not a Product of Interest "

F. Washington, D.C.: May 27, 2009

On February 25, 2009, WFO-SSA had assigned the Hasan lead to WFO-TFO and asked him to perform an assessment. Under informal FBI policy, Routine leads were to be closed or transformed into a case within ninety days. On May 27, 2009 – ninety days after WFO-SSA assigned the lead – WFO-TFO read it.

WFO-TFO noticed San Diego's misinterpretation of the DEIDS notation "Comm Officer." WFO-TFO had known others to interpret that notation to mean Communications Officer.

WFO-TFO searched DEIDS to confirm the military status and duty location of Nidal Malik Hasan. He searched the DoD Joint Personnel Adjudication System and learned that Hasan had a Secret clearance and had recently passed a clearance re-investigation. WFO-TFO searched the FBI Telephone Applications database and found no links between the telephone number shown in Hasan's DEIDS report and any "target" numbers. WFO-TFO's search of the FBI's Automated Case Support (ACS) system using Hasan's email address returned only San Diego's EC.

WFO-TFO did not search DWS-EDMS, IDW, or DaLAS. Although he was a member of a [REDACTED] counterterrorism squad, he says he did not know that DWS-EDMS existed. He believes that no one at WFO CT-1 other than an Intelligence Analyst, WFO-Analyst, had access to DWS-EDMS until after the Fort Hood shootings. He had previously reviewed [REDACTED] [FBI-acquired communications], but only in ACS.

WFO-TFO contacted DoD-Analyst, a non-JTTF DCIS Intelligence Analyst based in Arlington, Virginia. He asked DoD-Analyst to obtain records on Hasan from the Defense Manpower Personnel Center in Monterey, California. She emailed the records to him.

WFO-TFO had limited access to DoD personnel files. The files he could review, which DoD-Analyst provided to him, consisted of Hasan's Electronic Personnel File, which totaled approximately 65 pages. The file included, among other things:

- Academic Evaluation Reports and Academic Transcripts from the Uniformed Services University for Health Sciences dating to 1999;
- Six Officer Evaluation Reports (OERs) covering June 2003 to June 2008; and
- Promotion Orders.

The OERs contained almost uniformly positive evaluations of Hasan by his superior officers. For example, the Department Chair of Psychiatry at Walter Reed wrote that Hasan's research on Islamic beliefs regarding military service during the Global War on Terror "has extraordinary potential to inform national policy and military strategy." There were comments that Hasan deserved promotion. The Promotion Orders showed that Hasan had been promoted from Captain to Major ten days earlier, on May 17, 2009. The only derogatory information that WFO-TFO found was an indication that Hasan had not passed his Army Physical Fitness Test between July 2007 and June 2008.

WFO-TFO did not have access to any files maintained locally by Hasan's command. Those files revealed that the program directors overseeing Hasan during his residency and fellowship at Walter Reed and the Uniformed Services University of the Health Sciences ranked him in the bottom 25 percent. He was placed on probation and remediation and often failed to meet basic job expectations such as attendance at work and being available when he was the physician on call. WFO-TFO also did not have access to a memorandum to the National Capital Consortium's Credentials Committee, dated May 17, 2007, faulting Hasan's professionalism and work ethic, which was leaked to the media in the aftermath of the Fort Hood shootings.

Based on what he read, WFO-TFO believed that Hasan's communications with Aulaqi were relevant to his research on Islam and the military. WFO-TFO decided that Hasan was not involved in terrorist activities. He took no further investigative action.

WFO-TFO then consulted WFO-SSA. WFO-SSA did not ask whether Aulaqi had responded to Hasan's messages or whether there were any further emails between Hasan and Aulaqi. He did ask whether WFO-TFO had checked all of the FBI databases. WFO-TFO said that he had.

WFO-SSA and WFO-TFO discussed whether an interview of Hasan or his supervisor would be appropriate. They believed that any overt investigative steps would do more harm than good. Given the [REDACTED] origin of the information [REDACTED], WFO-SSA and WFO-TFO believed that interviewing Hasan would jeopardize the [Aulaqi investigation.] [REDACTED] They could think of no way to interview Hasan without

disclosing the FBI's access to the messages, [REDACTED] which would harm the prime interest – San Diego's investigation of Aulaqi. Neither WFO-SSA nor WFO-TFO believed a pretext interview of Hasan would be appropriate.

WFO-SSA and WFO-TFO also believed that the "least intrusive means" requirement precluded an interview of Hasan or contact with his superior officers. They knew that an interview is a permissible technique for an assessment. They believed, however, that Hasan's messages were relevant to his research and that an interview of Hasan was unnecessary. WFO-TFO believed that an interview would require notification to Hasan's commanding officer; that the interview would probably be briefed up the Army chain of command; and that this would harm Hasan's career. As a result, WFO-TFO considered an interview highly intrusive.

WFO-SSA agreed with WFO-TFO's conclusions – including the determination that Hasan was not a threat – and believed that no further action was appropriate.

Neither WFO-SSA nor WFO-TFO considered approaching Hasan as a potential confidential human source. In their view, a good source had access to information. The two messages to Aulaqi contained no indication that Hasan could provide useful information.

After these actions and discussion – which took place within the span of four hours on the same day, May 27, 2009 – WFO-TFO wrote and WFO-SSA approved the WFO EC response to the lead. After outlining the information gathered, the WFO response concluded:

Due to [REDACTED] Hasan's email contact with Aulaqi, Hasan was not contacted, nor were his command officials. Given the context of his military/medical research and the content of his, to date, unanswered messages, WFO does not currently assess Hasan to be involved in terrorist activities. WFO will re-assess this matter if additional information is identified.

Although the response stated that WFO had "reviewed FBI and Department of Defense databases and record systems" and that Hasan's messages were "to date, unanswered," WFO had not checked DWS-EDMS, [IDW, and DaLAS] to determine whether this was correct.

WFO sent the response to San Diego, ITOS 1 (CONUS 6 and CONUS 2), and the Baltimore Field Office (because Hasan's home address was located in Baltimore's Area of Responsibility).

G. San Diego: May 27, 2009 – June 11, 2009

On May 31, 2009, Hasan visited Aulaqi's website and sent another message to him:

Assalam Alaikum Wa-RhamatuAllahi Wa-Barakatuhu brother Anwar;
InshAllah Khair,

I heard a speaker defending suicide bombings as permissible and have been using his logic in debates to see how effective it really is.

He contends that suicide is permissible in certain cases. He defines suicide as one who purposely takes his own life but insists that the important issue is your intention.

For example, he reported a recent incident where an American Soldier jumped on a grenade that was thrown at a group of soldiers. In doing so he saved 7 soldiers but killed himself. He consciously made a decision to kill himself but his intention was to save his comrades and indeed he was successful. So, he says this proves that suicide is permissible in this example because he is a hero. Then he compares this to a soldier who sneaks into an enemy camp during dinner and detonates his suicide vest to prevent an attack that is known to be planned the following day. The suicide bombers' intention is to kill numerous soldiers to prevent the attack to save his fellow people the following day. He is successful. His intention was to save his people/fellow soldiers and the strategy was to sacrifice his life.

The logic seems to make sense to me because in the first example he proves that suicide is permissible i.e. most would consider him a hero. I don't want to make this too long but the issue of "collateral damage" where a decision is made to allow the killing of innocents for a valuable target. If the Qur'an states to fight your enemies as they fight you but don't transgress. So, I would assume that suicide bomber whose aim is to kill enemy soldiers or their helpers but also kill innocents in the process is acceptable. Furthermore, if enemy soldiers are using other tactics that are unethical/unconscionable than those same tactics may be used.

JazakAllah Khair, P.S. We miss hearing from you!

Aulaqi did not respond. [REDACTED] SD-Analyst reviewed this email and [identified] it [REDACTED] "Needs Review." SD-Agent then reviewed the email and [REDACTED] [identified] it "Not a Product of Interest" and "Not Pertinent" because he read it as [REDACTED]
[REDACTED]

H. San Diego and Washington, D.C.: June 11, 2009 – June 15, 2009

On or about June 11, 2009, SD-Agent reviewed WFO's response to the lead. He was disappointed. He believed the assessment was "slim." The information about Hasan's personnel files was unhelpful, because personnel files typically contain praise. The reasons for not interviewing Hasan seemed to be weak excuses for not taking additional action.

Despite WFO's offer to "re-assess this matter if additional information is identified," SD-Agent and SD-Analyst did not check DWS-EDMS for additional messages between Hasan and Aulaqi.

SD-Agent showed the response to SD-TFO2 and SD-TFO3. They agreed that the assessment was inadequate. SD-TFO2 found it hard to believe that a DoD representative had written the response. SD-TFO3 found the response so strange that he suspected that Hasan was a confidential source for WFO.

SD-Agent decided to follow-up with WFO. He had taken that step only once before in his career, when another Field Office had failed to take action on a lead. SD-Agent knew his FBI counterpart WFO-SSA. Instead of contacting him, SD-Agent put SD-TFO3 in what SD-Agent considered the "uncomfortable position" of asking a fellow DCIS Agent why he did not take further action. SD-Agent took this approach to avoid being, in his words, "the heavy" in dealing with a DCIS Agent in another JTTF. He did not consider bringing the issue to his supervisor, to WFO-SSA, or to anyone at Headquarters.

SD-TFO3 contacted a DCIS program manager to ask for background information on WFO-TFO. The program manager spoke positively about WFO-TFO.

SD-TFO3 called WFO-TFO on June 11, 2009. WFO-TFO said he was unable to talk because he was occupied with a shooting incident at the Holocaust Museum. He said they could talk as soon as he was available.

On the following day, June 12, 2009, SD-TFO3 emailed WFO-TFO. The full text of his message reads:

[WFO-TFO],

We just received your response to our lead on 415F-SD-60934, Subj: Anwar Nasser Aulaqi re: Assessment of Nidal Malik Hasan (a US Army Captain, Medical Doctor, Walter Reed).

The case agent wanted me to follow up on this commenting: The response looks a little slim, i.e. limited probing into this individual's background, no contact w/ command and no interview of Hasan.

We were wondering if we were missing something, i.e. we need to read between the lines (Hasan is a friend of WFO)?

[SD-TFO3], Special Agent
DCIS San Diego Resident Agency

WFO-TFO discussed the email with WFO-SSA. WFO-SSA did not consider contacting SD-Agent. He left the response to WFO-TFO, and advised him to "be nice" in responding. WFO-TFO sent the following email to SD-TFO3 that afternoon:

[SD-TFO3]: Sorry I couldn't get back to you on a hard line yesterday. I never made it into the JTTF scif as I (along with most everyone else) was pulled to work the Holocaust Museum shooting.

Please note that I looked into HASAN as a result of a discretionary lead, "for action as deemed appropriate." From your email, I assume SD desired a deeper investigation. However, since HASAN's contact with Aulaqi [REDACTED], I did not contact him nor his command officials directly. I did however, determine that HASAN was conducting US Army sponsored research that was online with the questions he sent Aulaqi.

Due to [REDACTED] HASAN's email contact with AULAQI, HASAN was not contacted, nor were his command officials. Given the context of his military/medical research and the content of his, to date unanswered email messages, WFO does not currently assess HASAN to be involved in terrorist activities. WFO will re-assess this matter if additional information is identified.

To my knowledge, HASAN is not a CHS nor "a friend of WFO." If you have additional information regarding HASAN's links to terrorism or request any specific action, please share and we will re-assess. BTW, HASAN lives in Baltimore's AOR but works in WFO's AOR. I copied Baltimore on the response EC.

SD-TFO3 forwarded WFO-TFO's email to SD-Agent, with the following cover message:

[SD-Agent],

RE: E-mail from Hasan to Aulaqi

This will not be a satisfying read. That said, I've asked the question of WFO and here's their answer.

A few days later, on or about June 15, 2009, SD-Agent visited SD-TFO3 to discuss WFO-TFO's email. SD-Agent was upset. He again asked SD-TFO3 to call WFO-TFO to find out why WFO had done nothing further.

According to SD-TFO3, he called WFO-TFO again. SD-TFO3 told him that, upon receiving a lead like this one, San Diego would have conducted, at the least, an interview of the subject. SD-TFO3 recalls that WFO-TFO replied, in effect (paraphrased, not a quotation): "This is not SD, it's DC and WFO doesn't go out and interview every Muslim guy who visits extremist websites. Besides, this guy has a legitimate work related reasons to be going to these sites and engaging these extremists in dialogue. WFO did not assess this guy as a terrorism threat." SD-TFO3 also recalls that WFO-TFO indicated that this subject is "politically sensitive for WFO."

WFO-TFO, on the other hand, does not recall receiving another telephone call from SD-TFO3. The FBI does not have records of SD-TFO3's telephone calls from the San Diego JTTF.

According to FBI written policy, "the receiving office" – here, WFO – "will decide what, if any, action to take" on a Discretionary Action Lead. MAOP § 10.2.9(1)(a)-(c). SD-Agent and SD-TFO3 dropped their inquiries to WFO. They believed they had done all they could do.

I. San Diego: June 16, 2009 – June 17, 2009 and After

On the next day, June 16, 2009, [REDACTED] Hasan [sent his] final message to Aulaqi. Hasan sent the message via the website. Its full text read:

Assalam Alaikum Wa-RhamatuAllahi Wa-Barakatuhu,

I listened to a lecture that made a parallel between Iblis and the People of the book and was wondering if it was consistent with what the Quran teaches. He basically stated that Allah (SWT)

speaks the truth and should always be obeyed. He told the story of how Allah (SWT) told Adam (AS) to take Shaitan as an enemy and told him to stay away from the tree. Shaitan told Adam that he was his well wisher and the only reason the tree was denied him because it would make him an angel or live forever. So Adam listened to Shaitan and neglected the heedings of his lord. He goes on to say that Allah (SWT) warns us not to take the people of the book as protecting friends (aulia) and the lecturer stated that if we ignore Allah (SWT) like Adam we will have no excuse if we end up in hell fire because of the advice given by the people of the book. He explains that some of the people of the book are sincere in their advice but are ignorant and if you listen to sincere ignorant advice over Allah (SWT) you fall at your own peril. V/R Nidal

SD-Analyst reviewed the email and [REDACTED] [identified] it "Not a Product of Interest" and "Not Pertinent."

[REDACTED] [By] June 16, 2009, the date of Hasan's last message, [SD-Agent and SD-Analyst had reviewed more than 20,000 electronic documents as part of the investigation – on average 1,375 per month, or 65 to 70 per work day.] [REDACTED]

The weighty pace of activity on the [Aulaqi investigation] [REDACTED] continued after Hasan's last message. On July 1, 2009, the Aulaqi investigation shifted from "315" to "415" designation as part of an administrative revision of case classification codes. [REDACTED] As of November 5, 2009, the date of the Fort Hood shootings, [REDACTED] [SD-Agent and SD-Analyst had reviewed more than 29,000 electronic documents – on average 1,525 per month, or 70-75 per work day.]

The FBI took no further action concerning Hasan until November 5, 2009.

J. Aftermath

Effective July 15, 2009, the U.S. Army transferred Hasan from Walter Reed Army Medical Center to the Darnall Army Medical Center at Fort Hood, Texas. Fort Hood is the Army's staging area for deployment to combat zones.

On August 16, 2009, Hasan reported to the Killeen Police Department that a fellow Army soldier, John Van De Walker, had vandalized his car. Police arrested Van De Walker on October 21, 2009. According to newspaper reports, he confessed that Hasan's bumper sticker, which referenced Allah, offended him. He used a key to scratch Hasan's car.

On July 31, 2009, Hasan purchased a Herstal FN-57 handgun from Guns Galore in Killeen, Texas.

In October 2009, the U.S. Army notified Hasan that he would be deployed to Afghanistan in November 2009.

On November 5, 2009, Hasan entered the Fort Hood deployment center, where he shot and killed thirteen people and wounded 43 others. Nearly five months had passed without any further known personal communications between Hasan and Aulaqi (see Chapter 7).

In the wake of the shootings, Aulaqi publicly hailed Hasan as a role model for his attack on fellow soldiers, stating: "Who would object to that?"

SD-Agent continued to [REDACTED] [investigate Aulaqi] with the assistance of other San Diego JTTF members and ITOS Analysts. SD-Analyst transitioned to a domestic terrorism squad, which he had requested prior to the Fort Hood shootings. WFO-SSA transferred from WFO to [REDACTED] [another FBI] Field Office, where he is a member of [REDACTED] [its] JTTF. WFO-TFO has returned to DCIS as Special Agent in Charge of [one of its offices.] [REDACTED]

[REDACTED] [In mid]-2011, an FBI [REDACTED] report documented an interview with an FBI subject [REDACTED] in which [REDACTED] [the subject] claimed to have met Aulaqi after the Fort Hood shootings. According to [REDACTED] [the subject], Aulaqi told him that Hasan "had contacted him via the Internet and had asked what he could do to help Muslims" and that Aulaqi had "advised Hasan that since he was an American soldier, he should kill other American soldiers." According to [REDACTED] [the subject], Aulaqi said he had given Hasan "permission to carry out his attacks at Fort Hood."

Although Hasan did contact Aulaqi via the Internet, we found no evidence, direct or indirect, that Aulaqi made these purported statements to Hasan (see Chapter 7). The evidence shows instead that Aulaqi did not even respond to Hasan's first message and its question about whether the acts of Muslim soldiers who had killed other soldiers could be reconciled with the Quran. The WASHINGTON POST reported on November 16, 2009, that in an interview with a Yemeni journalist, Aulaqi "said that he neither ordered nor pressured Maj. Nidal M. Hasan to harm Americans...."

On September 30, 2011, the White House and the State Department confirmed reports that Anwar Nasser al-Aulaqi had been killed in Yemen.

Chapter 7:

Review of FBI Data Holdings on Nidal Malik Hasan

A. Introduction and Conclusions

We conducted, to the degree possible given the criminal investigation and prosecution of Hasan, an independent investigation of all FBI data holdings to assess:

- (1) Whether contemporaneous searches of FBI data holdings on December 17, 2008 (the date of Hasan's first message); January 7, 2009 (the date of San Diego's lead); May 27, 2009 (the date of WFO's response to San Diego); or November 4, 2009 (the day before the shootings) would have revealed other information about Hasan;
- (2) Whether there was any evidence of other electronic communications between Hasan and Aulaqi;
- (3) Whether surveillance of Hasan's email in the weeks before the shootings would have produced any actionable evidence of imminent violence or other wrongdoing; and
- (4) Whether the FBI's post-shooting review of FBI and USIC data holdings on Hasan was accurate and complete.

Our investigation concludes that:

- (1) Contemporaneous searches of FBI data holdings would not have revealed any suggestion of impending wrongdoing by Hasan or any other actionable information about Hasan;
- (2) There is evidence of electronic communications between Hasan and Aulaqi other than the eighteen messages [reviewed by SD-Agent and SD-Analyst] [REDACTED] but those communications were generic mass "news" emails that Aulaqi sent to all persons who subscribed to his website's email list;
- (3) Surveillance of the NidalHasan@aol.com email account in the weeks preceding the shootings would not have produced any actionable evidence of imminent violence or other wrongdoing; and
- (4) The FBI's post-shooting review of FBI and USIC data holdings on Hasan was professional, comprehensive, accurate, and complete. (We did not examine, and

do not express any views on, other elements of the FBI's post-shooting investigation of Hasan.)

B. Contemporaneous Searches of FBI Holdings

To assess whether the FBI possessed other information about Hasan as of December 17, 2008 (the date of his first message); January 7, 2009 (the date of the lead); May 27, 2009 (the date of WFO's response to San Diego); or November 4, 2009 (the day before the shootings), we searched the FBI's primary data holdings: ACS, DWS-EDMS, IDW, and DaLAS.

ACS. We searched all ACS holdings as of November 5, 2009, using the search terms [REDACTED]. Our search returned only San Diego's EC of January 7, 2009, setting the lead on Hasan.

DWS-EDMS. We searched all DWS-EDMS holdings as of November 5, 2009, using the search terms NidalHasan@aol.com [REDACTED].

A full text search using the term NidalHasan@aol.com returned [REDACTED] [some of the] known communications between Hasan and Aulaqi. [REDACTED]

The messages sent via Aulaqi's website included the search term, but adjacent to other characters, as <NidalHasan@aol.com>. As a result – and underscoring the limitations of literal search technologies – a full text search did not return those messages.

A "participant" search for NidalHasan@aol.com – which is limited to iterations of email accounts – avoided the full text search limitations and returned [all messages between Hasan and Aulaqi that SD-Agent and SD-Analyst reviewed.] [REDACTED]

The search [REDACTED] returned [REDACTED] [all messages between Hasan and Aulaqi that SD-Agent and SD-Analyst reviewed]; and one match from [REDACTED] [an unrelated investigation] (which we discuss below).

The [REDACTED] matches for [REDACTED] included the [REDACTED] matches for [REDACTED]. We reviewed each of the remaining [REDACTED] matches. [REDACTED] None involved the Nidal Hasan at issue.

SD-Agent conducted a "participant" search of DWS on or about January 7, 2009, using NidalHasan@aol.com. That search returned the message Hasan sent to Aulaqi on January 1, 2009. If SD-Agent or SD-Analyst had searched DWS – and later, DWS-EDMS – using the only

other identifying search terms known at the time [REDACTED] then or at any other time before November 5, 2009, they would have found only one relevant product other than [the messages between Hasan and Aulaqi that SD-Agent and SD-Analyst reviewed] [REDACTED]

Our search revealed the name Nidal Hasan in the text of a March 29, 2006, [REDACTED] mailing list message [REDACTED] [that the FBI acquired in] an investigation unrelated to Aulaqi. The post is titled "Imam Needed for Walter Reed Army Medical Center." Its text reveals that Nidal Hasan is a member of the military by referencing Walter Reed and including one of Hasan's military email addresses as a contact. The person who posted the text appears to have copied it from another online source – probably an Internet post by Hasan.

The full text, which the reviewing Agent on that separate [REDACTED] [investigation] properly tagged "Non-Pertinent," reads:

Assalamu 'alaykum was rahmatullah,

Brothers and sisters,

Walter Reed Army Medical Center is in need of an Imam for jumua'ah prayers held at WRAMC in Washington, DC, as well as to console/make dua for Muslim patients in the Medical Center.

This has the option of becoming a full-time position, based on experience and educational qualification.

For more information, please contact br. Nidal Hasan at Nidal.Hasan@NA.AMEDD.ARMY.MIL.

May Allah bless your efforts, wassalama 'alaykum,

DaLAS. We also searched all DaLAS holdings as of November 5, 2009, using the search terms NidalHasan@aol.com [REDACTED]

These searches returned [REDACTED] matches. We reviewed each file. One file was the [REDACTED] "Imam Needed" mailing list message noted above, which had been uploaded to DaLAS on August 5, 2008, in a case unrelated to Hasan. Because of potential attorney-client privileged information, access to that file was restricted to specified users.

None of the other files involved the Nidal Hasan at issue here. As discussed below, as of November 5, 2009, DaLAS did hold one other non-pertinent product involving Hasan; but that product could be tied to Hasan only through an email address that the FBI identified after the shootings. A search of DaLAS using all potential search terms known to San Diego and WFO prior to the shootings could not have returned that item.

C. FBI Searches of FBI Data Holdings

In the immediate aftermath of the Fort Hood shootings, STAS conducted a search of all FBI data holdings to identify all information in the FBI's possession involving Hasan. STAS identified the [REDACTED] "Imam Needed" post that we located in our search of DWS-EDMS.

The Electronic Communications Analysis Unit (ECAU) and the Digital Media Exploitation Unit (DMX) later conducted a second search in support of the criminal investigation and prosecution. Prior to this search, the U.S. Army Criminal Investigation Division (CID) had supplied ECAU and DMX with all content and metadata for five DoD email addresses associated with Hasan. ECAU had independently determined that, in addition to the NidalHasan@aol.com account, Hasan had a second AOL account with email and instant messaging (AIM) addresses as well as a Yahoo! email account.

FBI Analysts checked these nine email/AIM addresses against four FBI databases (ACS, Clearwater, DaLAS, and DWS-EDMS) as well as several USIC databases. The Analysts found [REDACTED] matches [REDACTED] in FBI holdings.

[REDACTED] [One] match on a search for Nidal.Hasan@NA.AMEDD.ARMY.MIL, returned the "Imam Needed" post [noted above] in DWS-EDMS and DaLAS.

[REDACTED] Another match, on a search for Hasan's other AOL email address, was located in DaLAS on a forensic image of a computer hard drive that the FBI's Newark Division had seized in 2007 pursuant to a criminal warrant in a tax case. This product is also innocuous. It shows that, on February 10, 2005, Hasan had used his other AOL address to visit a non-Jihadist web forum and post a question about the Quran's prohibition on intoxicants. The full text reads:

Asssalum wa Alakum; I discovered Islam 2 years ago and have been building my knowledge base of the Quaran and Sunna. My question is concerning the verse in the Quaran that refers to intoxicants and the multiple hadiths that indicate the prohibition of its use. Perhaps if a islamic leader took charge we would have mediations that seve as great pain relievers as well as anti anxiety medications that arent [sic] intoxicants. However, the best materials we have now are intoxicants ie: valium, ativan, percocet, morphine etc. Should physicians be prescribing these even if the prophet SAWS stated more or less that he hoped whoever takes an intoxicant for medication purposes doesn't [sic] get better.

Conclusion: Based on our review, we conclude that contemporaneous searches of FBI data holdings on any date between December 17, 2008, and November 4, 2009, would not have disclosed any other actionable information about Hasan.

D. Evidence of Other Electronic Communications Between Hasan and Aulaqi

In the aftermath of the Fort Hood shootings, the FBI obtained access to the existing contents of Hasan's known private and military email accounts. We reviewed the content of Hasan's active private account, NidalHasan@aol.com. We also interviewed FBI personnel tasked with reviewing Hasan's other email accounts and the contents of his computer hard drive and telecommunications devices. There is no certainty that the contents of these accounts and media provide a complete history of Hasan's communications prior to the shootings. Most email systems delete sent messages automatically or after a specified time period, and users may delete messages as they see fit and set rules to delete messages after specified time periods. Moreover, email deleted from Hasan's New Mail, Old Mail, Sent Items, and Trash folders on AOL would not normally be recoverable because AOL regularly purges its systems of deleted email. With these limitations in mind, neither the extensive ECAU/DMX review nor our relatively limited review identified any other personal contact between Hasan and Aulaqi.

Our review of the NidalHasan@aol.com account disclosed, however, that Hasan did receive other electronic communications from Aulaqi. None of these communications was personal or specific to Hasan. Instead, at some date prior to December 21, 2008 – at about the same time he sent his first message to Aulaqi – Hasan had subscribed to a Google FeedBurner list to receive “Anwar Al Awlaki On-Line” email updates, by which he and an unknown number of other subscribers received irregular mass email announcements, articles, and other statements from Aulaqi.

The email updates were issued to FeedBurner – and, in turn, to NidalHasan@aol.com and other subscribers – from the email account donotreply@anwar-alAulaqi.com. [REDACTED]

[REDACTED] The FBI did not acquire these emails until after the Fort Hood shooting. [REDACTED]

Through his subscription, Hasan received and retained at least 29 email updates from Anwar al Awlaki On-Line. The subjects of these updates varied and included, for example:

- A December 20, 2008, email, titled “Salutations to al-Shabab of Somalia,” offered congratulations to al-Shabaab “for your victories and achievements,” asked Allah to “guide you and grant you victory,” and noted that “[o]nly Allah knows that if my circumstances would have allowed I would not have hesitated in joining you and being a soldier in your ranks”;
- A January 5, 2009, email provided Word and .pdf copies of Aulaqi's article “44 Ways of Supporting Jihad”;
- A July 14, 2009, email discussed “Fighting Against Government Armies in the Muslim World,” challenging the Muslims “fighting on behalf of America against the mujahideen in Pakistan, Somalia and the Maghrib.... What kind of twisted figh[t] is this? The blame should be placed on the soldier who is willing to follow orders

whether the order is to kill Muslims as in Swat, bomb Masjids as with the Red Masjid, or kill women and children as they do in Somalia, just for the sake of a miser salary. This soldier is a heartless beast, bent on evil, who sells his religion for a few dollars. These armies are the number one enemy of the ummah. They are the worst of creation. Blessed are those who fight against them and blessed are those shuhada who are killed by them."

We reviewed Hasan's messages to Aulaqi in the added context of these mass-mailed messages from Aulaqi. We found no direct connection between the personal messages and the mass-mailed ones.

Conclusion: Upon completion of our review of FBI data holdings and interviews, we found no evidence that, in the year preceding November 5, 2009, Hasan and Aulaqi engaged in any person-to-person electronic communications other than in the 18 known messages

E. Post-Shooting Review of Seized Electronic Records and Media

We examined all available email messages associated with NidalHasan@aol.com that the FBI obtained during the investigation of the shootings. For the reasons noted above, the available email does not likely represent every email that Hasan sent and received using the account.

We read every existing email – 184 messages – that Hasan sent and received in the two weeks before November 5, 2009. We found no obvious evidence of the intentional deletion of email in those two weeks. We concluded that access to that email would not have provided any evidence of an imminent violent act.

The available email received by Hasan in those two weeks consisted primarily of unsolicited messages ("spam"); one of the Aulaqi mass newlist emails discussed above; and emails from other subscription news alerts (Google Alert, for "sharia"); RSS feeds (Islamistwatch.org), and newlists (islamicreliefusa.org, the Middle East Forum, newsrealblog, RadicalIslam.org,). The subjects of these emails also varied; for example:

- An article entitled "The Third Jihad" from RadicalIslam.org
- An article entitled "Exporting American anti-Americanism to Muslim world" from the Middle East Forum website
- A blog entry entitled "Imam Killed in FBI Shootout Sat on Board of Muslim Lobby Group MANA," also from the Middle East Forum website

Hasan's only existing personal emails in that two-week period were businesslike messages to and from U.S. Army representatives concerning his posting to Afghanistan and routine administrative and scheduling matters. We also found two emails exchanged with his brother, Anas Hasan. On October 30, 2009, Hasan wrote to Anas:

Assalum Alaikum Wa-RhamutaAllahu Wa-Baragatuho Wa-Maghfiratu,

Anas, I'm not sure if Eyad told you but I am leaving for Afghanistan next month. I will be leaving sometime next week to visit Eyad and his family in Virginia and then head towards Georgia for some final training before flying out. In any case, I have transferred 21,000 dollars that I owe you into the business account. We are now even- of course you take the 4,000 that you have of mine also for a total of 25,000. Please take it out ASAP, I don't like things floating and if you lose it for any reason it's your fault..

I have filled out a power of attorney so that you may handle my affairs in case I need something done during the 6 months I'm in Afghanistan or if I die, etc- I'm not sure if it will work for everything but I will give a copy to Eyad to hold when I visit him. In the event that I am incapacitated or not able to use my money/property i.e. captured by the enemy please donate my money/property to the poor as soon as possible- use your judgment but you know I'm trying to maximize by rewards. If I happen to die obviously split it according to the Islamic inheritance law and give the maximum allowable amount to a charity/sadaqa jariah etc- I think its 1/3 of my wealth. I am not aware of any psychiatrist that have died in Iraq/Afghanistan by enemy fire however it's always good to be prepared.

This message would raise suspicion only in hindsight. Read in the context of Hasan's impending deployment to Afghanistan, the message appears innocuous and the likely act of a soldier about to be deployed to a combat zone

On November 1, 2009, Anas sent Hasan an email titled "Cair: Houston Texas Office" that included only a website link. The link provides an online form to report any hate crime or incident of bias, profiling, or other discrimination to the Council on American-Islamic Relations' Houston office. This message may relate to John Van De Walker's vandalism of Hasan's car in August 2009.

In addition to reviewing every available email sent and received by Hasan in the two weeks prior to the shootings, we searched all available email in his AOL account using a series of potentially relevant search terms (including, among others, imam, jihad, gun, handgun, pistol, Herstal, Five-Seven, FN, FN-57). Our searches returned no emails containing those search terms.

Conclusion: Electronic surveillance of the NidalHasan@aol.com email account in the weeks preceding the shootings would not have produced any actionable evidence of imminent violence or other wrongdoing.

Part Two

Analysis of FBI Actions

The Terms of Reference asked Judge Webster to examine “whether the actions taken by the FBI were reasonable under the circumstances known at the time.” Our analysis of those actions cannot proceed from what we now know about Nidal Malik Hasan. Hindsight has uses, but it is not an appropriate tool for assessing the reasonableness and adequacy of actions taken without its benefit. Our review is based on information known or available to the FBI at the time the actions were taken.

We also recognize that reasonableness must be measured in the context of the FBI’s governing authorities and policies, operational capabilities, and the technological environment of the time. For example, as discussed in Chapter 3, the FBI’s governing authorities limit its ability to disseminate information acquired using FISA and require Agents and Task Force Officers to use the “least intrusive means” in conducting assessments and investigations. As discussed below, the FBI’s information technology and document review workflow did not guarantee that all foreign intelligence would be identified in DWS-EDMS.

Finally, we recognize our limited ability to predict what might have happened if different policies or procedures were in effect or personnel had made different decisions or taken different actions. We choose not to speculate. We examine instead the reasonableness of what did happen, in order to identify and recommend, when appropriate, better and corrective policies and practices for the future. We discuss those recommendations in Part Three.

We conclude that, working in the context of the FBI’s governing authorities and policies, operational capabilities, and the technological environment of the time, individuals who handled the Hasan information made mistakes. We do not find, and do not suggest, that these mistakes resulted from intentional misconduct or the disregard of duties. Indeed, we find that each Agent, Analyst, and Task Force Officer who handled the Hasan information acted with good intent. We do not find, and do not believe, that anyone is solely responsible for mistakes in handling the information. We do not believe it would be fair to hold these dedicated personnel, who work in a context of constant threats and limited resources, responsible for the tragedy at Fort Hood. We conclude instead that these committed individuals need better policy guidance to know what is expected of them in performing their duties, and better technology, review protocols, and training to navigate the ever-expanding flow of electronic information.

Chapter 8

Knowledge and Information Sharing

We begin by reviewing the FBI's understanding of violent radicalization. We then discuss what the FBI knew about Aulaqi and Hasan on January 7, 2009, when the San Diego JTTF set the lead to the Washington, D.C., JTTF (WFO), and on June 16, 2009, the date of Hasan's last message to Aulaqi. We also consider why the FBI did not share the Hasan information or the opening of the Hasan assessment with the Department of Defense (DoD).

A. The FBI's Understanding of Violent Radicalization (Chapter 1)

The FBI's understanding of violent radicalization is consistent with the contemporary views of the psychiatric community.

Before the events reviewed in this Report, the FBI had provided training on its radicalization model to Agents, Analysts, and Task Force Officers, including all personnel involved in the Hasan assessment. As discussed in Part Three, that training has expanded in the aftermath of the Fort Hood shootings.

B. The FBI's Knowledge About Anwar al-Aulaqi (Chapter 5)

As of January 7 and June 16, 2009, the FBI knew Anwar al-Aulaqi as an anti-American, radical Islamic cleric and the subject of a Tier [REDACTED] FBI counterterrorism investigation. San Diego believed [REDACTED] that Aulaqi was [developing ambitions beyond radicalization] [REDACTED].

WFO viewed him at that time as merely inspirational. The FBI's full understanding of Aulaqi's operational ambitions developed only after the attempted bombing of Northwest Airlines Flight 253 on Christmas Day 2009. Public awareness of the threat posed by Aulaqi is an even more recent development.

San Diego's lead reasonably described the FBI's knowledge about Aulaqi as of January 7, 2009.

C. The FBI's Knowledge About Nidal Malik Hasan (Chapters 6 and 7)

Our searches of the FBI's data holdings confirmed that San Diego's lead contained all of the FBI's actionable knowledge about Hasan as of January 7, 2009 (see Part One, Chapter 7). That knowledge justified an assessment of Hasan.

The FBI's knowledge grew, or should have grown, as San Diego reviewed fourteen further messages from Hasan to Aulaqi and two emails from Aulaqi to Hasan. That knowledge also grew, or should have grown, as WFO conducted its assessment of Hasan in May 2009 and San Diego reviewed WFO's assessment in June 2009.

The totality of that knowledge was limited. The FBI did not have access to all DoD records on Hasan, but only the limited information accessible by DoD personnel assigned as TFOs to San Diego and WFO. As a result, the FBI did not have direct access, until after the Fort Hood shootings, to the disturbing contents of Hasan's personnel files at Walter Reed Army Medical Center and the Uniformed Services University of the Health Sciences or to (among other things) Hasan's medical licensing records.

D. Information Sharing

The FBI did not share the Hasan information with any DoD employees other than the DCIS and NCIS personnel assigned to San Diego and WFO.

1. Notice of the Hasan Assessment (Chapter 6)

Prior to the Fort Hood shootings, the FBI had no written policy on advising DoD about counterterrorism assessments or investigations of members of the U.S. military, DoD civilian personnel, or others with known access to DoD facilities. FBI Field Offices informally shared information with DoD on a regular basis when these individuals became subjects of assessments or investigations. However, there was no formal procedure and no formal requirement to advise DoD about these assessments and investigations.

When San Diego set the lead to WFO, the FBI knew only that an individual said to be named Nidal Hasan had contacted Aulaqi from the Washington, D.C., area and that a U.S. Army officer named Nidal Malik Hasan worked in Washington, D.C. San Diego did not know with certainty that a U.S. Army officer had contacted Aulaqi until receiving WFO's assessment five months later.

San Diego's EC also set an Information Only ("read and clear") lead to International Terrorism Operations Section (ITOS) 1, Continental United States (CONUS) 6, which oversees the San Diego JTTF's intelligence collection and investigative efforts. SD-Agent's cover email to ITOS 1, CONUS 6 recommended not disseminating the information as an Intelligence Information Report (HIR) and stated: "If this needs to get to the military, WFO might have to do it internally."

In conducting its assessment of Hasan, WFO decided not to contact his chain of command. WFO's assessment, although "slim" in San Diego's estimation, concluded that Hasan was not involved in terrorist activities.

Under these circumstances, and in the absence of a formal policy requiring San Diego, WFO, or ITOS 1 to advise DoD about a counterterrorism assessment of a U.S. soldier, the failure of either JTTF to advise DoD about the information or the assessment was not unreasonable. However, the absence of a formal policy on notifying DoD of assessments or investigations of its personnel was unreasonable.

2. The Decision Not to Issue an Intelligence Information Report (Chapter 6)

The FBI did not issue an IIR to DoD and other USIC members concerning Hasan's first two messages. Dissemination of this information would have been appropriate, lawful, and consistent with FBI guidelines.

SD-Agent, SD-Analyst, and SD-TFO2 discussed issuing an IIR about the messages. There was an arguable reason to believe that the messages were foreign intelligence information that could be lawfully disseminated outside the FBI. The first message suggested that a U.S. soldier was seeking Aulaqi's advice on committing violence against fellow soldiers. Given Aulaqi's prominent inspirational role, this information reasonably appears necessary to the ability of the U.S. to protect against international terrorism – in this case, to protect against a U.S. soldier committing acts of violence against fellow soldiers on the battlefield. See 50 U.S.C. § 1801(e).

FBI policy is to share FBI intelligence when dissemination has the potential to protect the U.S. against threats to national security or improve the effectiveness of law enforcement. FBI INTELLIGENCE POLICY MANUAL § 1.7. As noted in Chapter 6, San Diego believed dissemination was permissible if a message reasonably appeared to concern taking part in jihad, engaging in violent conduct, or committing crimes – or if the information was believed valuable to the greater intelligence community. Given Hasan's apparent identity as a U.S. Army officer, his messages met these standards.

San Diego did not issue an IIR because of a mistake in interpreting Hasan's Defense Employee Interactive Data System (DEIDS) record. SD-TFO3 read the abbreviation "Comm Officer" to mean "Communications Officer" rather than "Commissioned Officer." SD-Agent thus believed that Hasan might have access to IIRs. To protect the [REDACTED] Aulaqi investigation [REDACTED], he decided not to issue an IIR and noted his concern about issuing an IIR in an email transmitting the lead to San Diego's overseers at FBI Headquarters, ITOS 1, CONUS 6.

SD-TFO3's misinterpretation of the DEIDS record was understandable; indeed, WFO-TFO noted that he had seen others make the same mistake. The mistake had serious consequences, however, because IIRs are a primary means by which the FBI shares information. An IIR could have provided notice to senior DoD officials of Hasan's communication with Aulaqi.

WFO's response to the lead corrected this mistake and identified Hasan as a U.S. Army Major and physician based at Walter Reed Army Medical Center. San Diego's initial interest in sending an IIR was to identify Hasan. Given WFO's identification of Hasan and its assessment that he was not involved in terrorist activities, San Diego had no reason to revisit the question of issuing an IIR.

Chapter 9

Ownership of the Lead

The FBI's operational actions suffered from a lack of clear ownership of the Hasan lead. After setting the lead, San Diego believed that WFO was responsible for Hasan. WFO, on the other hand, acted as if San Diego had responsibility for Hasan. The confusion resulted from the nature of Discretionary Action leads, as well as a lack of written policy guidance, the differing investigative interests of San Diego and WFO, a lack of priority, a misguided sense of professional courtesy, undue deference to military TFOs, and an inversion of the chain of command.

A. FBI Policy and Practice (Chapter 6)

No FBI written policy establishes ownership of interoffice leads. The FBI practice, however, is that the receiving office owns the lead. That office is responsible for taking action in response to the lead and determining what, if any, additional investigative steps are warranted. No policy or practice distinguishes "trip wire" and other "standalone" leads from other leads for purposes of ownership.

Effective April 2006, San Diego was the Office of Origin for the Aulaqi investigation. San Diego was thus the FBI Field Office with ultimate responsibility for that investigation. As a matter of practice, but not written policy, WFO owned the Hasan lead and had ultimate responsibility for its outcome. However, the lack of clear policy guidance resulted in neither JTTF taking effective ownership of the lead.

B. The Lead (Chapter 6)

San Diego's quarry was a known inspiration for violent extremists. SD-Agent and SD-Analyst believed he had [ambitions beyond radicalization] [REDACTED]. [REDACTED] [Their] primary purpose was to use [REDACTED] [the investigation] to gather and, when appropriate, disseminate intelligence about Aulaqi [REDACTED]. The "trip wire" effect of [REDACTED] [the investigation in identifying other persons of potential interest] was, in SD-Agent's words, a "fringe benefit." Certainly it was not the purpose or focus of the [REDACTED] investigation.

Upon reading Hasan's December 17, 2008, message to Aulaqi, SD-Agent and SD-Analyst identified a potential threat. Hasan asked Aulaqi whether a Muslim in the U.S. military would be considered a martyr for committing violent acts against fellow soldiers. SD-Agent's initial instinct was to determine whether the sender was a U.S. soldier. SD-TFO3 identified a U.S. Army officer named Nidal Malik Hasan who worked at Walter Reed Army Medical Center in Washington, D.C. SD-Agent set a lead to WFO because Hasan worked in its Area of

Responsibility. Before setting the lead, he checked DWS to determine if Aulaqi had responded to the email. He found a second email from Hasan expressing sympathy for the Iranian government.

SD-Agent set a Routine Discretionary Action Lead to WFO that contained both messages. The messages contained no suggestion of imminent violence and no overt threat. Because the lead did not demand action within 24 hours, FBI policy required San Diego to set the lead in the ordinary course of business – and thus, as a Routine lead. *See* MIOG Part II, § 16-1.4(2). Because conventional practice was to give the receiving office discretion in handling assessments of potential threats in its Area of Responsibility, the lead was “[f]or action as deemed appropriate.” SD-Agent had set prior leads on other “trip wire” contacts with Aulaqi. Each had been a Routine Discretionary Action lead.

The decision to set a Routine Discretionary Action lead was reasonable under the circumstances and then-existing policies. The follow-up, however, was not adequate.

San Diego’s EC also set an Information Only lead to ITOS 1, CONUS 6 at FBI Headquarters. SD-Agent’s cover email stated, in part: “If this needs to get to the military, WFO might have to do it internally.” This message indicates SD-Agent’s belief that, if WFO established that a U.S. Army officer sent the messages, WFO was responsible for notifying DoD about any assessment or investigation of Hasan. It also underscores San Diego’s belief that WFO was responsible for Hasan.

After setting the Hasan lead, SD-Agent and SD-Analyst returned their attention to the Aulaqi investigation. Hasan had no apparent connection to Aulaqi. He had contacted Aulaqi through his website, which suggested that he was a stranger. Nothing in his first two messages suggested an association with Aulaqi. Aulaqi had not responded to him. Because the Hasan lead had no direct relationship to the Aulaqi investigation – which did not need and was not waiting on its results – San Diego believed that Hasan was WFO’s responsibility. As a result, SD-Agent and SD-Analyst did not record Hasan’s name or email address for future reference. Without a DWS-EDMS [REDACTED] tool to assist them in tracking [REDACTED] [and correlating certain email data or to link a new message with earlier messages,] they reviewed sixteen further Hasan-Aulaqi messages over the next five months without tying them to the lead.

C. The Response (Chapter 6)

San Diego knew little about Nidal Hasan, but the available information suggested that a U.S. Army officer sympathetic to the Iranian government might be communicating with an Islamic extremist and radicalizer about violence against fellow soldiers. This potential threat deserved reasonably prompt action.

San Diego set the lead on January 7, 2009. SD-Agent believed that WFO, the receiving Field Office, would assign leads within 48 hours of receipt. FBI written policy requires Immediate and Priority leads to be assigned and resolved within two and twenty-four hours, respectively. *See* MIOG Part II, § 16-1.4(2). There is no formal policy guidance on the assignment or resolution of Routine leads. The timing of assignments thus depends on the

personal practice of the receiving supervisor. That timing, in turn, is audited at the Field Office/JTTF level. In contrast, FBI written policy directs supervisors to assign assessments generated on the Guardian Threat Tracking System within five business days of the receipt of the Guardian incident. A Headquarters unit, the Assessment Response Team, audits compliance with the Guardian policy.

At WFO, WFO-SSA did not read and assign the lead until February 25, 2009, nearly fifty days after the lead was set. The lead arrived when WFO was dealing with threats involving President Obama's inauguration. That does not excuse a failure to take the simple step of reading and assigning a lead within a reasonable number of days after its receipt.

There is no formal FBI policy that sets a deadline for the completion of work on Routine leads. Because file reviews occur on a quarterly basis, informal FBI policy requires personnel to complete work on Routine leads within ninety days of assignment. In the context of Guardian-based assessments, on the other hand, FBI written policy provides that "[e]very attempt must be made to 'mitigate' Guardian incidents within the first 30 days." [REDACTED] [FBI policy number redacted]. An extension of this 30-day deadline is permitted only with the written justification of a supervisor.

After WFO-SSA assigned the lead, WFO-TFO waited ninety days – until the day his work on the lead was supposed to be completed – to read it and take action. WFO-TFO could not recall why the work was put off until the ninetieth day. The timing could be coincidental. We believe, however, that the ninety-day delay in even reading the lead, let alone taking action, was unreasonable. That delay may have affected the shape, scope, and outcome of WFO's assessment of Hasan, which took place in four hours on that ninetieth day.

Five months passed before WFO responded to San Diego's lead. The delay in WFO's response pushed Hasan further from the minds of SD-Agent and SD-Analyst, and may have contributed to their failure to connect other Hasan-Aulaqi communications with the lead.

D. The Impasse (Chapter 6)

WFO had an obligation to assist San Diego in the Aulaqi investigation. WFO also had an obligation to determine the importance of the lead to its Area of Responsibility. WFO lacked policy guidance, however, on which office had ultimate responsibility for the lead.

Although the lead identified a potential threat in the Washington, D.C., area, WFO-SSA and WFO-TFO treated Hasan as part of San Diego's investigation of Aulaqi. This perspective appears to inform their apprehension about interviewing Hasan and conducting a more expansive assessment without first checking with San Diego. Yet WFO declined to take further action even after San Diego criticized WFO's assessment as "look[ing] a little slim" given "limited probing into [Hasan's] background, no contact [with] command, and no interview of [Hasan]." This message indicated that San Diego expected, at the least, that WFO would contact Hasan's command and interview Hasan. WFO did not take those steps and instead offered to "re-assess" if San Diego "request[ed] any specific action."

If SD-TFO3's recollection is accurate, his final phone call with WFO-TFO reflected the failure of either JTTF to take ownership of the Hasan threat. Without clear policy direction, each

looked to the other as responsible and as the final decision-maker. As a result, nothing further was done.

E. Deference to Military Task Force Officers (Chapter 6)

Both Field Offices compounded the lack of ownership by deferring to military TFOs.

SD-Agent asked DCIS and NCIS TFOs in San Diego to determine whether Hasan was a member of the U.S. military. He also involved those TFOs in the decision about whether to circulate an IIR on Hasan. Those actions were reasonable and prudent. Interagency synergy is a prime reason for the JTTF Program.

That synergy weakens, however, when the result is that TFOs assume sole responsibility for investigating members of their own departments or agencies. WFO-SSA's assignment of the lead to WFO-TFO had practical advantages. As a DCIS Agent, WFO-TFO had access to DoD resources and databases that were not available to FBI Agents and Analysts. He also had an insider's knowledge of DoD practices and procedures that could prove vital to an assessment of a service member. However, he also brought the subjectivity of an insider to the assessment. In this case, that subjectivity may have caused undue deference to the Army chain of command and undue concern about the potential impact of an interview on Hasan's military career, which appears to have driven the decision not to interview Hasan or contact his superiors.

F. An Inverted Chain of Command (Chapter 6)

The JTTF synergy also weakens when the FBI looks to military TFOs – or those of any other agency – to resolve disputes between JTTFs. Here, after SD-Agent reviewed WFO's response to the lead, he was reluctant to push back. He knew WFO-SSA. They were peers. Yet SD-Agent asked SD-TFO3 to contact WFO-TFO, DCIS Agent to DCIS Agent, even though the two had never met.

SD-Agent took this approach to avoid being, in his words, “the heavy” in dealing with a DCIS Agent in another JTTF. He was also concerned about professional courtesy and deference to another Field Office; indeed, he had pushed back at the response of another Field Office only once before in his career. SD-Agent's request also could have been based in part on SD-TFO3's reaction to WFO's response, which caused SD-TFO3 to wonder whether Hasan was a WFO asset.

SD-Agent's request also underscores the perception of the Hasan assessment as a military matter. That perception led both JTTFs to push the dispute down the FBI chain of command, to be resolved by DCIS TFOs, rather than up the chain of command to FBI supervisors or Headquarters. That action led, in turn, to a lack of resolution – and a lack of further investigation.

We understand SD-Agent's interest in extending professional courtesy and investigative deference to another Field Office. We appreciate the discomfort in challenging a TFO assigned to another Field Office about the sufficiency of his level of investigation. But too much is at stake for these concerns to guide (or deter) resolution of interoffice investigative disputes.

SD-Agent should have called WFO-SSA. If they could not resolve matters, SD-Agent should have raised the dispute up the FBI chain of command to his supervisor, who could have reviewed the matter and contacted WFO-SSA's supervisor. If disagreement continued, the supervisors could have turned to FBI Headquarters for resolution. This is how the FBI routinely handles interoffice disputes and disagreements, but only as a matter of unofficial policy.

G. The Lack of Formal Policies (Chapter 6)

The lack of formal policy guidance defining ownership of this lead and requiring elevation of interoffice disputes caused or contributed to a situation in which two JTTFs effectively disowned responsibility for the lead – each believing that the other office was responsible. That belief affected, in turn, each JTTF's sense of priority when it came to the assessment, the search for additional Hasan-Aulaqi communications, and how the conflict between the offices should be resolved.

The nature of Routine Discretionary Action Leads only added to the dissonance. At that time, written FBI policy on Discretionary Action Leads placed responsibility on the issuing office to set the lead while apparently placing responsibility on the receiving office to determine the adequacy of any action taken on the lead: "the recipient will decide what, if any, action to take...." MAOP § 10.2.9(1)(b).

The FBI should have provided formal policy guidance on the ownership of leads and interoffice dispute resolution.

Chapter 10

The Assessment

WFO-SSA and WFO-TFO erred in the process they followed to conclude that Hasan's communications with Aulaqi were benign and acceptable. They also erred in failing to search DWS-EDMS after the passage of five months, if only to determine whether Aulaqi had replied to Hasan's messages. Their assessment of Hasan was belated, incomplete, and rushed, primarily because of their workload; the lack of formal policy setting deadlines for the assignment and completion of Routine counterterrorism leads and establishing a baseline for information to be collected in counterterrorism assessments; WFO-TFO's lack of knowledge about and training on DWS-EDMS; the limited DoD personnel records available to WFO-TFO and other DoD TFOs; and the delay in assigning and working on the lead, which placed artificial time constraints on the assessment.

A. The Records Check (Chapter 6)

WFO-SSA and WFO-TFO assessed Hasan using the limited U.S. Army Electronic Personnel File that WFO-TFO had authority to access. Those records praised Hasan's research on Islam and the impact of beliefs and culture on military service, and also showed that he had been promoted to Major weeks earlier. WFO-TFO thus believed – and WFO-SSA agreed – that the Army encouraged Hasan's research and would approve of his communications with Aulaqi.

Based on this simple records check, those conclusions may have been reasonable. The two messages in San Diego's lead solicit Islamic opinions. Hasan made no attempt to disguise his identity and used an email address that revealed his proper name. If these two messages and the Electronic Personnel File were the universe of available information, they might provide a reasonable basis to believe that inquiries to a radical Islamic cleric were relevant to Hasan's research.

The U.S. Army records available to WFO-TFO did not present a complete or accurate picture of Hasan. Indeed, their contents were misleading. WFO-TFO did not have access to files maintained locally by Army command. As a result, he was unaware of the Army's issues with Hasan. We believe that DoD should examine whether DoD participants in the JTTF program should have full access to all DoD personnel records.

Despite the Army's interest in Hasan's research, his communications with an inspirational and potentially operational [redacted] [known radicalizer] under FBI investigation deserved scrutiny beyond a simple records check. As the final sentences of San Diego's lead state: "[redacted]

[redacted] Although the content of these messages was not overtly nefarious, this type of contact with Aulaqi would be of concern if the writer is actually the [active duty military officer] identified above." Regardless of his Electronic Personnel File, the lead warranted a closer look at Hasan, even if an interview were ruled out.

B. The Decision Not To Interview Hasan (Chapter 6)

The decision not to interview Hasan was flawed. WFO-TFO and WFO-SSA offered two explanations for it. First, both men believed that an interview could jeopardize the Aulaqi [investigation] ██████████ by revealing the FBI's access to Hasan's messages. This explanation is not persuasive. Pretext interviews are common FBI tradecraft. FBI Agents talk to subjects and assess threat levels every day without explaining the source of their knowledge. Pretexts for interviewing Hasan come easily to mind; for example, an Agent could have approached Hasan to ask for insights into Islamic radicalization, for information about the tolerance of Muslim soldiers in the U.S. military, or to discuss a possible guest lecture by Hasan based on his research.

Second, WFO-TFO and WFO-SSA concluded, from the records check, that Hasan was not "involved in terrorist activities." As a result, they believed that an interview and contact with Hasan's chain of command might jeopardize his military career, which in this instance they determined would be contrary to the DIOG's "least intrusive means" requirement. That requirement is straightforward: an investigative technique (for example, a records check or interview) may be used if it is the least intrusive feasible means of securing the desired information in a manner that provides confidence in the information's accuracy. DIOG § 4.4(B). Thus, when certain information can be obtained from public sources, Agents and TFOs generally should not obtain that information through more intrusive means, such as physical surveillance.

Here, San Diego's lead advised that, "[w]hile e-mail contact with Aulaqi does not necessarily indicate participation in terrorist-related matters ... this type of contact with Aulaqi would be of concern if the writer is actually the individual identified above." In response to the lead, WFO conducted an assessment to determine whether Hasan was "involved in terrorist activities." The first and only method WFO used to secure that knowledge was a records check. The available files suggested that Hasan's messages involved research, not terrorism; but the fact that messages to a radical imam appear to be benign academic inquiries does not answer the question of whether Hasan was a threat. The "least intrusive means" requirement did not prohibit further inquiry into that question, but would require a careful balancing of the competing interests of assessing a potential threat and minimizing potential harm to the subject of the assessment.

Moreover, when San Diego expressed doubts about WFO's assessment, the calculus of the least intrusive means requirement should have changed. The *next*-least intrusive means (for example, an interview) could have been used to resolve any doubts about the messages and provide more confidence in the accuracy of the information supporting WFO's conclusion. This is how the least intrusive means requirement is supposed to operate: selecting, step-by-step, the least intrusive technique(s) that will accomplish the operational objective at hand.

SD-TFO3's recollection of his final telephone call with WFO-TFO, if correct, indicates that another factor played a role in WFO's decision not to interview Hasan. According to SD-TFO3, he called WFO-TFO on or about June 15, 2009, and told him that, upon receiving a lead like this one, San Diego would have conducted, at the least, an interview of the subject. SD-TFO3 recalls that WFO-TFO replied, in effect (paraphrased, not a quotation): "This is not SD, it's DC and WFO doesn't go out and interview every Muslim guy who visits extremist websites."

According to SD-TFO3, WFO-TFO also advised him that this subject is “politically sensitive for WFO.”

C. The Failure To Search For Additional Messages (Chapters 4 and 6)

Hasan sent his first two messages on December 17, 2008, and January 1, 2009. San Diego set the lead on January 7, 2009. Before setting the lead, SD-Agent searched DWS to determine whether Aulaqi had responded to Hasan’s first message. That search returned Hasan’s second message.

In reviewing the lead and making the assessment five months later, neither WFO-TFO nor WFO-SSA considered searching DWS-EDMS to determine if Aulaqi had responded to these messages – or, indeed, if there were additional messages. Likewise, after reviewing WFO’s assessment of Hasan, neither SD-Agent nor SD-Analyst considered searching DWS-EDMS to identify “additional information” that might cause WFO to “re-assess this matter.”

The failure to search for additional messages resulted primarily from the FBI’s failure to provide TFOs with training on and access to DWS-EDMS and other FBI databases, the search and information management limitations of DWS-EDMS, the lack of ownership of the Hasan lead, and the absence of the type of initiative that Agents, Analysts, and TFOs should be encouraged to take, particularly when confronted with dissonant information or an interoffice dispute.

The FBI’s failure to instruct TFOs on the existence and use of DWS-EDMS – and to provide them with training on and access to the system – was unreasonable. The two TFOs primarily involved in the Hasan assessment – WFO-TFO and SD-TFO3 – did not even know that DWS-EDMS existed until after the Fort Hood shootings. Although SD-TFO1 and SD-TFO2 knew about DWS-EDMS – and SD-TFO2 received training on the system in April 2009 – neither of them had access to the system until after the shootings.

Because of WFO-TFO’s lack of knowledge, neither he nor anyone else at WFO searched DWS-EDMS using Hasan’s name or email address. WFO-TFO did search the FBI’s Telephone Applications using the telephone number in Hasan’s DEIDS record. He also searched ACS using Hasan’s email address, assuming incorrectly that San Diego would place any additional messages of note into that system. After finding only the lead, WFO-TFO made no further inquiries or searches of FBI databases. He did not ask his squad’s IA for assistance. He did not search the Investigative Data Warehouse (IDW) or the Data Loading and Analysis System (DaLAS), the FBI’s two largest databases of investigative and intelligence information. His limited searches and mistaken assumption about ACS reveal a broader lack of training on the FBI’s most precious counterterrorism resource – its information.

When presented with WFO-TFO’s analysis and conclusions, WFO-SSA did not think to ask whether Aulaqi had responded to Hasan’s messages or whether there had been additional messages during the five-month interlude. He did ask whether WFO-TFO had searched FBI databases. WFO-TFO’s affirmative response could have caused WFO-SSA to believe that he had searched DWS-EDMS, IDW, and DaLAS.

The failure to search DWS-EDMS and WFO-SSA's failure to confirm which databases had been searched, appear to have had significant ramifications. Depending on the search technique, that search, if performed on May 25, 2009, could have returned as many as [REDACTED] additional messages from Hasan, as well as Aulaqi's two emails to Hasan. The additional messages could have undermined the assumption that Hasan had contacted Aulaqi simply to research Islam. Indeed, WFO-SSA said – with the benefit of hindsight – that WFO would have opened a preliminary investigation of Hasan if he had seen all of the additional messages.

After receiving WFO's response, San Diego failed to search DWS-EDMS to determine whether there had been additional communications during the intervening five months. Under the circumstances, that failure is not unreasonable. SD-Agent and SD-Analyst believed that WFO had reviewed DWS-EDMS as part of the Hasan assessment. WFO's response to the lead stated that "WFO reviewed FBI and Department of Defense databases and record systems" and referred to Hasan's "to date unanswered email messages," which implied that WFO had reviewed DWS-EDMS. Moreover, SD-Agent and SD-Analyst had been reviewing the [information acquired in the Aulaqi investigation] [REDACTED] throughout the intervening five months, and no doubt believed – although perhaps mistakenly – that they would have identified any other messages of interest.

The collective failure of WFO and San Diego to review DWS-EDMS in May and June 2009 also underscores the lack of clear policy guidance on which Field Office owned the Hasan lead. WFO believed that it was San Diego's responsibility to forward any additional messages of interest that were relevant to the lead. San Diego, on the other hand, believed that it was WFO's responsibility to search DWS-EDMS and other FBI databases when acting on the lead.

D. WFO's Baseline Collection for Assessment (Chapter 6)

On September 24, 2009, the FBI Counterterrorism Division sent an Electronic Communication (EC) to all Field Offices with guidance on the Division's "Baseline Collection Plan" for terrorism assessments and investigations. FBI Counterterrorism Division, *Baseline Collection Plan Administrative and Operational Guidance* (Sept. 24, 2009). Baseline Collection is a framework, consistent with the DIOG, "to guide investigators in obtaining information and intelligence and using investigative methods during the course of each DT [Domestic Terrorism] and IT [International Terrorism] investigation." The Division intended the Baseline Collection "to establish a foundation of intelligence upon which the FBI may base the decision to continue or close an assessment or investigation."

The EC identifies a series of actions that constitute the expected Baseline Collection of information when conducting an assessment or investigation. Although not sent until September 2009, the EC represents a relatively contemporaneous objective standard for measuring the reasonableness and adequacy of WFO's assessment of Hasan and San Diego's view of that assessment. (Because the EC was effective on November 15, 2009, and thus parallels in time the FBI's remedial responses to the Fort Hood shootings, we examine its sufficiency in Part Three.)

The Baseline Collection standards include the following questions and searches relevant to the Hasan assessment:

Is there reason to believe that your subject has been in email contact with subjects of other FBI investigations? If so, compare relevant data concerning the subject's email account(s) contained within FBI databases: DWS/EDMS, ACS, IDW and DaLas.

Is there reason to believe that the subject has purchased or is licensed to possess firearms or explosives? If so, run NCIC checks and/or contact local ATF representatives or any available State database in the relevant jurisdiction to collect responsive records or information.

Is there any reason to believe, considering the subject's background, including employment and criminal history, that he has received specialized training or experience or has specialized knowledge in military tactics or operations, law enforcement, firearms or explosives, or similar subjects?

Viewed under the Baseline Collection standards, WFO's assessment was deficient in failing to search for "relevant data concerning the subject's email account(s) contained within FBI databases" including DWS-EDMS. That search, if conducted on May 25, 2009, would have disclosed (depending on the search technique) as many as [REDACTED] additional messages from Hasan to Aulaqi, as well as Aulaqi's two emails to Hasan. WFO's assessment also did not pursue the questions concerning firearms ownership and training, experience, and knowledge in military tactics; but the revelation that Hasan was a U.S. Army psychiatrist may have tempered any concern about these subjects.

The Baseline Collection standards do not require interviews as part of an assessment. Instead, after the Baseline Collection is obtained, the "Assessment may continue until factual information is developed that warrants opening a predicated investigation or until a judgment can be made that the target does not pose a terrorism or criminal threat." The EC thus supports the reasonableness of San Diego's view that the assessment was inadequate. It also supports the reasonableness of San Diego's belief that, at minimum, WFO would have reviewed DWS-EDMS as part of the Hasan assessment.

E. Workload and the Lack of Formal Policies (Chapter 6)

We cannot assess the role that workload played in the assessment. The nearly fifty-day delay in the assignment of the lead and the ninety-day delay in taking action on the lead suggest that WFO CT-1 was overburdened. If so, that underscores the importance of formal policy direction that allows supervisors as well as SAs, IAs, and TFOs to understand, prioritize, and manage their workloads. Otherwise, the FBI risks creating circumstances in which Routine leads are prioritized by the order of receipt, rather than the order of potential importance.

Formal deadlines would have required WFO-SSA and WFO-TFO to read the Hasan lead at earlier dates and make informed decisions about whether to assign and complete the lead at earlier dates.

Likewise, a formal policy on baseline collections for assessments like the one instituted on September 24, 2009, would have advised WFO-TFO about the existence of DWS-EDMS and caused WFO to search [information acquired in the Aulaqi investigation] [REDACTED]. That search, if performed on May 25, 2009, could have located as many as [REDACTED] additional messages from Hasan, as well as Aulaqi's two emails to Hasan.

The absence of formal policy guidance setting deadlines for assignment and resolution of Routine counterterrorism leads and establishing a baseline for information to be collected in counterterrorism assessments caused or contributed to an assessment of Hasan that was belated, incomplete, and rushed

Chapter 11

Information Technology and Information Review Workflow

A. Information Technology Limitations (Chapter 4)

STAS designed DWS in 2001 as a transactional database to record [redacted] [all communications] intercepts [redacted]. In the intervening years, DWS-EDMS has been transformed into a warehouse database that holds [redacted] information obtained [through exercise of the FBI's criminal and counterterrorism authorities (see Chapter 3).] [redacted]

Through a series of STAS improvements and enhancements beginning in 2009 and continuing today, DWS-EDMS is a capable tool for the review of the ever-increasing [redacted] [volume of investigative] information, but it lacks the modern hardware infrastructure needed to fulfill and preserve its crucial functionality.

The lack of a modern hardware infrastructure has two major implications. First, the relatively aged server configuration for DWS-EDMS and its ever-increasing data storage demands, coupled with ever-increasing use, creates slowdowns that we witnessed repeatedly in our hands-on use of the system. An Agent in the field with considerable DWS-EDMS experience reported that the slowdowns deterred searching the system.

Second, DWS-EDMS lacks a "live" or "failover" disaster recovery backup. [redacted]

B. Information Review Workflow (Chapters 4 and 5)

In examining San Diego's [redacted] review of the [information acquired in the Aulagi investigation] [redacted], we identified serious concerns about the available technology and two interrelated concerns about human actions: questionable decisions in [redacted] [reviewing] certain Hasan-Aulagi communications and the failure to relate later communications to the lead set on January 7, 2009. Our investigation of these matters leads us to conclude that the technological tools and review workflow for this [information] [redacted] [redacted] were inadequate.

With the admitted benefit of hindsight – and a lack of broader context – we may disagree with certain decisions SD-Agent and SD-Analyst made when reviewing [redacted] the Hasan-Aulagi communications. For example, between February 2 and March 3, 2009, Hasan sent

several messages to Aulaqi offering financial assistance. These messages triggered Aulaqi's only two responses. On May 31, 2009, Hasan suggested that he viewed suicide bombing as permissible in certain circumstances. SD-Agent [redacted] [identified] each email as "Non-Pertinent" and "Not a Product of Interest." He explained the financial-assistance messages as relating only to the upkeep of Aulaqi's website. He dismissed the suicide-bombing message because Hasan seemed to describe a third-party's opinion, although Hasan wrote that the logic "make[s] sense to me" and that "I would assume that [a] suicide bomber whose aim is to kill enemy soldiers or their helpers but also kill innocents in the process is acceptable."

We are mindful that SD-Agent is the Case Agent on the Aulaqi investigation and that the words of Aulaqi and his associates were the focus as SD-Agent and SD-Analyst reviewed the [information] [redacted]. We are unable to assess the reasonableness of these [redacted] [identifying] decisions outside the context of the [redacted] [nearly 20,000] other Aulaqi-related [redacted] [electronic documents] that SD-Agent and SD-Analyst reviewed [redacted] in the sixteen months between March 16, 2008, and June 17, 2009.

We find, however, that the FBI's information technology and document review workflow did not assure that all [redacted] [information] would be identified [redacted] and managed correctly and effectively in DWS-EDMS because of a confluence of factors: (1) the humanity of the reviewers; (2) the nature of language; (3) the [redacted] [volume of the Aulaqi information] [redacted]; (4) the workload; (5) limited training on databases and search and management tools; (6) antiquated and slow computer technology and infrastructure; (7) inadequate data management tools; (8) the inability to relate DWS-EDMS data easily, if at all, to data in other FBI stores; and (9) the absence of a managed quality control regime for [review of strategic collections] [redacted].

C. The Human Factor (Chapters 4 and 6)

Agents, Analysts, and Task Force Officers are human. We may hope for, but we cannot expect, perfection. [redacted] [FBI governing authorities] require reviewers to decide whether a document is "Not Pertinent" or "Pertinent." (Like reviewers in the field, we use "Pertinent" to describe the categories of information that fulfill the [requirements] [redacted]. Research shows that trained information reviewers faced with binary decisions like those made by [redacted] [FBI] reviewers – relevant/irrelevant, responsive/non-responsive, pertinent/non-pertinent – identify only about 75% of the relevant documents and, indeed, agree with each other's decisions only about 75% of the time (see Chapter 4).

Although differences in the background and experience of reviewers, as well as extrinsic and random factors (for example, inattention, distraction, fatigue, or illness) can produce variations in accurate decision-making about the relevance – or, in the review of [redacted] [case information], pertinence – of information, the primary factors are those we now discuss.

D. The Language Barrier (Chapters 4 and 6)

[REDACTED]—The inherent ambiguity of language and the presence of jargon, idiom, foreign languages, and code challenge even the most capable reviewers and search technologies.

E. The Data Explosion (Chapters 4 and 6)

The exponential growth in the amount of electronically stored information is a critical challenge to the FBI. As of May 2011, the holdings of DWS-EDMS exceeded [REDACTED] of data, the equivalent of [REDACTED] printed pages of text. DWS-EDMS holdings increase, on average, by [REDACTED] files each week.

[REDACTED]

F. Workload (Chapters 4, 5, and 6)

The Aulaqi [investigation] [REDACTED] is a stark example of the impact of the data explosion. SD-Agent and SD-Analyst confronted a weighty review task [REDACTED]. SD-Agent spent approximately three hours each day reviewing the [REDACTED] [information acquired in the Aulaqi investigation]. SD-Analyst spent about 40% of his time on the investigation.

By November 5, 2009, the date of the Fort Hood shootings, the Aulaqi [investigation] [REDACTED] had required SD-Agent and SD-Analyst to review 29,041 [REDACTED] [electronic documents – on average,] approximately 1,525 [REDACTED] per month, or 70 to 75 [REDACTED] per work day. At times, the average number of [REDACTED] [electronic documents reviewed] ranged higher than 130 per work day.

The complexity of their review task was exacerbated by [the diversity of the electronic information]. [REDACTED]

[REDACTED]

As these statistics show, the [REDACTED] [information review demands of the Aulaqi investigation were] relentless. The constant flow of [REDACTED] [information] and the nature of the Aulaqi threat required SD-Agent and SD-Analyst to [devote time throughout each day to its review]. [REDACTED]

[REDACTED]

G. [redacted] [Identifying] Requirements (Chapters 4, 5, and 6)

[redacted] FBI policies required SD-Agent and SD-Analyst to make [redacted] [multiple] decisions [redacted] about each product, [including] [redacted] Attorney-Client Privilege, [redacted] Workflow, and Translation. Although the [redacted] categories include an Unreviewed/ Undecided checkbox, the FBI trains and expects reviewers to make [redacted] [identification] decisions immediately upon reviewing each product.

H. The Lack of DWS-EDMS Training (Chapters 4, 5, and 6)

To obtain DWS-EDMS access, an Agent, Analyst, or TFO must first complete three training courses in the FBI's Virtual Academy. None of these courses provides instruction on how to use the DWS-EDMS search tool or other functionalities.

Many Agents and most TFOs did not receive training on DWS-EDMS and other FBI databases until after the FBI's internal investigation of the Fort Hood shootings. Even for Agents and Analysts with access before the Fort Hood shootings, there was no formal training program for DWS-EDMS; instead, most "training" was on the job. Our interviews and visits to the field revealed significant disparities in skill at using the search and management functions of DWS-EDMS.

I. Search Tools (Chapters 4 and 6)

Although not originally designed as a warehouse database, DWS-EDMS became the depository of [redacted] information [redacted] [acquired through the exercise of its criminal and counterterrorism authorities and techniques] [redacted]. Today, DWS-EDMS is a capable, if overburdened, tool for the conventional review of [information] [redacted] [redacted] and has improved dramatically with its [redacted] [September 2011] incarnation. In early 2009, however, DWS-EDMS lacked functionalities for the effective review and management of [redacted] [the large quantities of information collected in the Aulaqi investigation]. Even today, it lacks the modern hardware needed to fulfill its potential.

Our interviews with DWS-EDMS users, including the participants in the Hasan matter, elicited the following typical comments about the system: "awkward"; "complex"; "difficult"; "cumbersome"; and "terrible." Each user, not unexpectedly, had particular issues with the system's search tools, management tools, and responsiveness.

We replicated, through hands-on use of the technology, the steps taken by SD-Agent and SD-Analyst in reviewing the [information acquired in the Aulaqi investigation] [redacted] and, in particular, the Hasan-Aulaqi communications. We undertook searches of DWS-EDMS using Hasan's name and email address that could have been pursued by WFO [redacted] and [redacted] San Diego in [redacted] 2009. We also performed or supervised other searches of DWS-EDMS to test its

functionality. Our hands-on experience with the system confirms the assessments of users in the field.

1. Two Interfaces

In May 2009, the Special Technology Applications Section (STAS) upgraded the DWS-EDMS graphic user interface (GUI) to reduce the number of menus and commands, reorganize filters and preferences, and provide three new search methods (by case ID, court-assigned docket number, and facility). However, STAS retained the original GUI – now called DWS-EDMS Classic – as an alternative interface because the new GUI lacked its analysis tools and report capabilities. As a result, users must choose which GUI to use in reviewing [REDACTED] [acquired communications products]. Each has advantages and disadvantages. As noted below, the choice may affect the outcome of searches.

2. Search Limitations

DWS-EDMS search capabilities are limited. The primary search modes are by [REDACTED]. These searches are literal, and return only documents containing the specified identifier or keyword, whether alone or in specified relationships (a “Boolean” search – for example, (“smoking” and “gun”) or (“smoking” within five words of “gun”). Anyone who has used Westlaw, Lexis, or Google understands the methodology. Relying on keyword searches to identify, compare, analyze, tag, and retrieve information of potential interest is time-consuming, impractical, and inefficient. It is also risky.

Keyword searches are both under- and over-inclusive. They return only those electronic records containing the specified word or words, and will not capture documents using similar words – for example, abbreviations, acronyms, synonyms, nicknames, and misspellings. Thus, a search for “gun” will not return “pistol” or “rifle.” At the same time, keyword searches capture every document, whether potentially relevant or not, that contains a keyword; thus, a search for “gun” will return documents involving a squirt gun, a glue gun, the phrase “under the gun.”

Increasing the number of keywords may reduce the risk of missing responsive information. A dedicated search for “gun” should include synonyms like “pistol” and “rifle” and “weapon”; but the greater the number of keywords, the greater the number of non-responsive records that will be returned.

The search technique may also affect the outcome. We found, for example, that a “full text” search for products containing the email address NidalHasan@aol.com returned only nine of the eighteen Hasan-Aulaqi communications, even though that address appeared in every one of them. The reason is that a DWS-EDMS full text search will not return [REDACTED].

A “participant” search, on the other hand, returned all of the communications. We learned of similar experiences during our interviews. For example, WFO-TFO reported that, in the aftermath of the shootings, WFO-Analyst searched Hasan’s email address in DWS-EDMS and obtained different results depending on whether she used DWS-EDMS or DWS-EDMS Classic.

3. Potential Inaccuracy

[redacted] [I]ssues with the [redacted] search index used on DWS-EDMS create the possibility that full text searches of the system will be incomplete.

4. Responsiveness

The hardware hosting DWS-EDMS [is dated] [redacted]. It is operating under maximum stress. As a result, the responsiveness of the DWS-EDMS database to search queries is remarkably slow. Our test searches produced wait times for results that took twenty seconds and longer, and occasionally “timed out” (i.e., failed because of the time consumed by the search). One Agent noted that, with a [redacted] [long] wait for the system to open a new window, DWS-EDMS deterred searches.

J. Management Tools (Chapters 4 and 6)

When San Diego set the Hasan lead in January 2009, DWS had no tool for [automatically tracking and correlating certain email data] [redacted]

[redacted]. Although the DWS-EDMS upgrade in February 2009 eliminated certain of these shortcomings, those fixes came long after San Diego set the lead.

Because of these shortcomings, SD-Agent and SD-Analyst had to [redacted] [redacted] [correlate email data] [redacted] outside DWS [redacted]. SD-Agent used his memory and notes. SD-Analyst used an Excel spreadsheet and notes. Because Hasan was a “trip wire” lead and not apparently relevant to the Aulahi investigation – and underscoring the lack of policy guidance on ownership of the lead – neither [redacted] [SD-Agent nor SD-Analyst] recorded Hasan’s name or email address for potential future reference.

Requiring reviewers to rely on memory, off-system records, or a manual search process to [correlate email data] [redacted]

[redacted] is not feasible in a data-heavy working environment. Indeed, as the Hasan matter reveals, it may be risky.

K. Lack of Managed Document Review and Quality Control (Chapters 4, 5, and 6)

Because any review of information is prone to error, the standard for information review is not perfection, but accuracy within tolerances that are consistent with professionalism, diligence, and reasonable care. These tolerances require well-designed quality control measures based on effective training, project management, performance measurement, and reporting. The FBI did not provide the San Diego reviewers with any of these basic safeguards.

SD-Agent and SD-Analyst were the only two FBI personnel [redacted] [reviewing] the communications [acquired in the investigation] of the leading English-speaking inspiration for violent Islamic extremism. Their ideal, not always fulfilled, was that both of them would review all new products over the course of each work day. There was no other backstop. Although International Terrorism Operations Section (ITOS) 1, Continental United States (CONUS) 6 had program management responsibility for overseeing the San Diego JTTF's intelligence collection and investigative efforts, the FBI had not implemented any procedures for ITOS 1, CONUS 6 to assess, validate, or contextualize the results of San Diego's review, whether to detect potential [redacted] [identification] errors, identify information requiring additional review, link disparate message threads, assess the potential for additional "trip wire" investigations, or conduct retrospective strategic analysis.

L. The Workflow (Chapters 4, 5, and 6)

The confluence of these diverse human and technological factors forced SD-Agent and SD-Analyst to review, [redacted] using a linear, forward-looking workflow, [redacted] each of the Hasan-Aulaqi communications [redacted] in isolation as eighteen of the nearly 8,000 [redacted] [electronic documents] [redacted] that they reviewed between December 18, 2008, and June 16, 2009. That workflow encouraged anticipatory review, analysis, and [redacted] identification of [redacted] products, but discouraged reflection, connectivity, and retrospective review and analysis. The operational and technological context in which SD-Agent and SD-Analyst worked, not their actions as reviewers, was unreasonable.

The decision on [redacted] [information's] "Pertinence" depends primarily on the [redacted] [content] of the [redacted] [information]; its context; the reviewer's knowledge of the subject matter, the sender, and/or the recipient; the reviewer's training and experience – and ideally, on a broader perspective drawn from other [information in the investigation] [redacted] intelligence located elsewhere in the FBI's possession, and other reviewers. As SD-Agent learned when he searched DWS-EDMS before setting the Hasan lead, the decision also depends on time. That search located a second Hasan message to Aulaqi, which SD-Agent had reviewed only days earlier and [redacted] [identified] "Not a Product of Interest." Read later and in the context of the first message, the second message became part of an EC setting a lead on a potential terrorism threat.

Decisions on pertinence may be tactical (the Hasan lead) and strategic (the Aulaqi investigation). Agents, Analysts, and Task Force Officers may have different goals in mind when assessing electronic information and these goals may vary over time. The limited search and management capabilities of DWS-EDMS as it existed in 2008-2009 and a linear, forward-looking, unmanaged workflow prevented San Diego from connecting Hasan's messages and making strategic judgments about those messages.

Part Three

Assessment Of
FBI Remedial Actions

Following its internal review of the Fort Hood shootings, the FBI made important changes to its policies, operations, and technology. The FBI and the Department of Defense (DoD) recommended certain of these changes to the Assistant to the President for Homeland Security and Counterterrorism on November 30, 2009. In the months that followed – and in the wake of the attempted Christmas Day 2009 bombing of Northwest Flight 253 and the attempted Times Square bombing of May 1, 2010 – further changes have occurred.

The Terms of Reference asked Judge Webster to examine “whether the steps the FBI is taking following an internal review of the shooting are sufficient or whether there are other policy or procedural steps the FBI should consider to improve its ability to detect and deter such threats in the future.”

We applaud the steps the FBI took in response to its internal review and subsequent events. In this Chapter, we assess those steps. In Part Four, we discuss additional policy, procedural, and technological improvements that the FBI should consider to improve its ability to detect and deter future threats.

A. Information Sharing

1. FBI-DoD Clearinghouse Process for Counterterrorism Assessments and Investigations of Military Personnel

Effective November 2009, the FBI and DoD adopted a clearinghouse procedure to provide notice to DoD of any FBI counterterrorism assessment or investigation of a known member of the military, a known DoD civilian employee, or a person known to have access to military facilities. Under this procedure, JTTFs must notify the Counterterrorism Division – which, in turn, notifies the NJTTF – upon opening the assessment or investigation. The notification must include the subject’s identity and branch affiliation, the basis or predication for the assessment or investigation, and contact information for the FBI case agent and supervisor. However, the notification cannot contain information that cannot be disseminated under FISA Minimization requirements.

The NJTTF must, within ten days, transmit the notification by Letterhead Memorandum (LHM) to the appropriate headquarters Military Counterintelligence Service and to the Deputy Director of the Defense Intelligence Agency’s Defense Counterintelligence and HUMINT Center (DCHC). Within ten days of receiving the LHM, those military entities must send a confirmation of receipt to the FBI. This process is designed to provide notice at the executive level and the field level.

The FBI and DoD implemented these procedures informally in late November 2009. The FBI formally implemented the procedures by a memorandum to the field on January 7, 2010.

In late November 2009, the FBI sent DoD a listing of [REDACTED] active counterterrorism assessments and investigations with a military nexus. By May 2011, the FBI had used this clearinghouse process to notify DoD of an additional [REDACTED] counterterrorism assessments or investigations of military/DoD personnel.

Conclusion: This procedure assures that, as a matter of written policy, the FBI will provide timely and consistent notice of counterterrorism assessments and investigations of known members of the military, DoD civilian employees, and others with access to military facilities to DoD at the executive and field levels. It is an important information sharing development.

If this procedure had been implemented prior to November 5, 2009, its impact on the Hasan assessment is a matter of conjecture. Although the procedure might have raised the visibility of the assessment inside the FBI, it might not have changed WFO's assessment or San Diego's reaction to that assessment. The primary impact would have depended on DoD's response and any action that DoD investigators would have taken alone or in cooperation with the FBI.

We do not believe that this clearinghouse procedure alone is sufficient to resolve the information sharing issues implicated by this matter. As discussed in Part Five, we recommend that the FBI create a formal policy establishing a clearinghouse procedure for counterterrorism assessments and investigations of known law enforcement personnel. We also recommend that the FBI proceed with plans to identify other federal departments and agencies (for example, the Department of State and the Transportation Security Administration) as potential subjects of comparable information sharing procedures – thus requiring JTTFs to inform the Counterterrorism Division and the NJTTF (and, if appropriate, the relevant department or agency) of counterterrorism assessments and investigations involving employees of those departments and agencies.

2. Consolidation of FBI-DoD Memoranda of Understanding on Information Sharing, Operational Coordination, and Investigative Responsibilities

DOJ and DoD have executed, effective August 2, 2011, a base agreement (MOU) setting forth a framework for future agreements governing information sharing, operational coordination, and investigative responsibilities between the FBI and DoD. Through annexes to the base agreement, the FBI and DoD will define each party's investigative responsibilities, as well as obligations and responsibilities to share information and to coordinate operations.

The FBI and DoD are negotiating subject matter-specific annexes that will govern, among other things, information-sharing and operational coordination/jurisdiction in counterterrorism and counterintelligence contexts and the sharing of the Terrorist Screening Center's watchlist information.

When the annexes on information-sharing and operational coordination/jurisdiction in counterterrorism and counterintelligence contexts are signed, they and the base MOU will collectively supersede the Agreement Governing the Conduct of Department of Defense Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation (1979) and its 1996 supplement, as well as the MOU Regarding Coordination of Counterintelligence Matters (1991).

Conclusion: There are approximately 167 FBI-DoD Memoranda of Understanding. Some 114 of these agreements concern, at least in part, information-sharing. (A number of these agreements involve specific operations or situations, and are effectively inoperative.) We believe that the base MOU and its annexes on information-sharing and operational coordination represent a major step toward consolidating and refining those diverse agreements. We encourage the FBI and DoD to continue in their efforts to consolidate and refine those agreements that are fundamental to their shared responsibilities.

B. Operations

1. Discontinuance of "Discretionary Action Leads"

In the relevant time frame, the FBI permitted three types of leads: Action Required, Discretionary Action, and Information Only. MANUAL OF ADMINISTRATIVE OPERATIONS AND PROCEDURES (MAOP) § 10.2.9(1). "Action Required leads are used if the sending office requires the receiving office to take some type of action.... Discretionary Action leads are used if the sending office has some information that may be of importance to the receiving office. These leads may or may not require action by the recipient, and the recipient will decide what, if any, action to take.... Information Only leads are used for information only and when no specific action is required or necessary." MAOP § 10.2.9(1)(a)-(c).

By Electronic Communication (EC) dated March 2, 2010, the FBI discontinued the use of Discretionary Action leads effective March 19, 2010. All pending Discretionary Action leads were to be completed no later than May 20, 2010, or converted into Action Required leads. As a result of this change, any lead issued for other than informational purposes is an Action Required lead. The receiving Field Office cannot ignore the lead, and must do something in response. The EC directs personnel setting Action Required Leads to "adhere to the concept of utilizing the least intrusive alternative that is operationally sound, effective and efficient in obtaining the desired investigative outcome."

Conclusion: The elimination of Discretionary Action leads creates a single category of working leads and avoids prioritization of leads based on the designations Action Required and Discretionary Action. It also assures that receiving Field Offices take some action in response to every working lead.

In setting Action Required leads, however, a Field Office may continue to allow the receiving Field Office to decide what action to take. In other words, the discontinuation of Discretionary Action leads does not necessarily require the sending Field Office to specify actions to be taken or eliminate the receiving Field Office's discretion in deciding what action to take. That is understandable, given the practical need to defer to the receiving office's expertise in its Area of Responsibility, its resources, and potentially greater experience with handling the subject matter of the lead.

If this change had been made prior to the Hasan matter, we believe – and the JTTF personnel involved agree – that it would not have changed San Diego's lead or WFO's response. San Diego would have set an Action Required lead that gave WFO discretion on how to handle

the lead. WFO would have taken the same actions in response to that Action Required lead as they did in response to the Discretionary Action lead.

The elimination of Discretionary Action leads is thus important; but, on its own, it is not a sufficient remedy. Timely and effective action on Action Required leads demands written policies imposing formal deadlines for responding to leads, identifying the minimum information to be gathered in response to leads (consistent with the “least intrusive means” principle), and resolving conflicts between JTTFs and Field Offices about the adequacy of an assessment or investigation. The FBI has taken some, but not all, of the steps necessary to resolve these issues. We recommend that it take the remaining steps (see Part Five).

2. Counterterrorism Baseline Collection Plan

On September 24, 2009, the Counterterrorism Division sent an EC to all Field Offices with guidance on the Division’s new “Baseline Collection Plan” for counterterrorism assessments and investigations. FBI Counterterrorism Division, *Baseline Collection Plan Administrative and Operational Guidance* (Sept. 24, 2009). The EC took effect on November 15, 2009, ten days after the Fort Hood shootings. Before that date, the FBI did not prescribe the minimum information that should be collected in counterterrorism assessments and investigations. Although not technically a post-Fort Hood corrective action, we assess the Baseline Collection Plan as a contemporaneous action that is relevant to the discontinuation of discretionary leads and to minimizing the risks of future assessments and investigations.

The Baseline Collection Plan is a framework, consistent with the DIOG, “to guide investigators in obtaining information and intelligence and using investigative methods during the course of each DT [Domestic Terrorism] and IT [International Terrorism] investigation.” The Division intended the Plan “to establish a foundation of intelligence upon which the FBI may base the decision to continue or close an assessment or investigation.” *Baseline Collection Plan Administrative and Operational Guidance* at 2.

The Plan identifies a series of inquiries and actions that constitute the expected minimum Baseline Collection of information when conducting assessments and investigations. Those actions do not require interviews as part of assessments, but do require a level of inquiry that exceeds the steps taken in the WFO assessment of Hasan.

Conclusion: The Baseline Collection Plan provides useful guidance to Agents, Analysts, and TFOs about the factual information that is basic to most assessments and preliminary investigations. The Plan also standardizes the basic information to be collected. As with any baseline, there is a risk that its minimum requirements could stifle creative thinking and become a checklist – the ceiling, rather than the floor, for information collection. We encourage effective training, communications, and reminders about the Plan to assure that its minimums are perceived as a starting point, not an ending one.

If the Baseline Collection Plan had been implemented prior to the Hasan assessment, its impact on the outcome could have been significant. The Plan states that, if “there [is] reason to believe that your subject has been in email contact with subjects of other FBI investigations,” the Agent, Analyst, or TFO must “compare relevant data concerning the subject’s email account(s)

contained within FBI databases: DWS/EDMS, ACS, IDW and DaLas.” That requirement, if met, would have alerted WFO-TFO to the existence of DWS/EDMS and caused someone at WFO to search that database on his behalf. Depending on when and how that search was conducted, it could have revealed the existence as many as fourteen additional communications between Hasan and Aulaqi. The content of those communications or Hasan’s persistence in sending unanswered emails could have changed WFO’s assessment of Hasan – or, at least, prompted an interview and discussions with his chain of command. The potential impact on the assessment underscores the importance of effective implementation of the Baseline Collection Plan.

3. [REDACTED] [Certain Conduct] Triggers Investigation

As a result of the Fort Hood shootings, the FBI opened assessments [of certain U.S. persons] [REDACTED]
[REDACTED]

Conclusion: This trigger is appropriate [REDACTED] post-Fort Hood [REDACTED] given [Aulaqi’s] [REDACTED] highly publicized reputation in the aftermath of the shootings and the attempted Christmas Day 2009 bombing of Northwest Airlines Flight 253.

Whether [REDACTED] [this trigger] would have been reasonable before the shootings [REDACTED]

[REDACTED] is more problematic. As of November 5, 2009, Aulaqi was the subject of a Tier [REDACTED] investigation. A considerable [REDACTED] [amount of information acquired in the Aulaqi investigation] concerned mundane issues [or] [REDACTED]

[REDACTED] implicated First Amendment protections. [REDACTED]

[Implementation of this trigger before November 5, 2009], would have been inconsistent with [REDACTED] civil liberties and privacy interests [REDACTED].

[The redacted portion involves classified FBI investigative techniques and ongoing investigations.]

4. Decisions to Close Certain Investigations of DoD Personnel

At the time of the Fort Hood shootings, FBI and DoD practice was to elevate any objections by one entity to the other’s decision to close an investigation of a military member, civilian DoD employee, or other person with access to military facilities. The FBI and DoD are formalizing this practice in the MOU annex on counterterrorism operational coordination (see Section A.2).

Conclusion: As a result of the implementation of the FBI-DoD Clearinghouse Process for Counterterrorism Assessments and Investigations of Military Personnel (see Section A.1), military investigative agencies should be involved, directly or indirectly, in all FBI investigations

The FBI Counterterrorism Division and Directorate of Intelligence have designated certain foreign intelligence collections [REDACTED] as Strategic Collections [REDACTED]. FBI Headquarters – and, when appropriate, [REDACTED] [other government agencies] – will [apply additional resources and conduct] [REDACTED] [additional analysis of data collected] [through] Strategic Collections [REDACTED].

Conclusion: The Hasan matter shows that certain [REDACTED] [intelligence collections] [REDACTED] serve a dual role, providing intelligence on the target while also serving as a means of identifying otherwise unknown persons with potentially radical or violent intent or susceptibilities. The identification and designation of Strategic Collections [REDACTED] will allow the FBI to focus additional resources – and, when appropriate, those of [REDACTED] [other government agencies] – on collections most likely to serve as “trip wires.” This will, in turn, increase the scrutiny of information that is most likely to implicate persons in the process of violent radicalization – or, indeed, who have radicalized with violent intent. This will also provide Strategic Collections [REDACTED] with a significant element of program management, managed review, and quality control that was lacking in the pre-Fort Hood [review of information acquired in the Aulaqi investigation] [REDACTED].

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C. Technology

Because of the large and ever-increasing amount of electronically stored information in FBI data stores, any change in policy or procedure that affects the collection, storage, review, search, identification, or management of data must be assessed carefully for its practical impact on human resources and the review workflow.

1. Automatic Linking of Email [Data] [REDACTED]

STAS modified DWS-EDMS on February 17, 2010, to inform users [automatically of links between certain email data] [REDACTED]

Conclusion: This is a useful, although limited, revision of DWS-EDMS search functionality. The link eliminates the need for reviewers to open a search window [REDACTED]. More important, it enables DWS-EDMS users to view [information] [REDACTED] in a broader context [REDACTED]. The reviewer can thus make better-informed decisions about the [email data] [REDACTED].

This revision is a good example of the way in which automation of even relatively simple tasks can expedite, assist, and inform the review of electronic information. It is also a good example, however, of the way in which automation can limit or skew review. A search using the hyperlink will return only [REDACTED]. On the other hand, “participant” searches from the DWS-EDMS search window using [REDACTED] will return not only [REDACTED], but also [REDACTED].

If implemented before November 5, 2009, this revision would have had limited value to San Diego’s review. Hasan’s initial seven (7) messages to Aulaqi were not emails, but messages sent via the “Contact the Sheikh” function of Aulaqi’s website. The website’s internal email account then automatically transferred the messages by email to one of Aulaqi’s email addresses. [REDACTED] [The modification] would not have revealed those seven messages as part of the exchange between Hasan and Aulaqi. Moreover, reviewers might not have clicked on the link if [REDACTED] [Hasan’s communications] did not trigger a memory that he was the subject of a lead.

2. Automatic Flagging of [Certain Email Data] [REDACTED]

STAS also modified DWS-EDMS on February 17, 2010, to automatically flag [certain email data] [REDACTED]

[REDACTED] In the aftermath of the Fort Hood shootings, the FBI believed that [this email data could assist in identifying persons of potential interest] [REDACTED]

[REDACTED] [The flag] is, of course, merely a visual cue and not, in and of itself, a basis for or indicator of any investigative action.

Conclusion: This modification provides a unique visual stimulus when [the FBI acquires email containing certain data] [REDACTED]

[REDACTED] The flag also reminds the reviewer that contacts [REDACTED] may trigger the new [REDACTED] procedure outlined in Section [REDACTED].

If implemented prior to November 5, 2009, this change would not have assisted reviewers in identifying Hasan [REDACTED]

That said, this revision provides a useful visual cue for reviewers and should remain active.

3. Flagging DWS-EDMS Activity As [REDACTED]

On May 17, 2010, STAS implemented a [tool that allows DWS-EDMS users to flag certain communications regardless of the case in which these communications are located.] [REDACTED]

[The redacted portions describe details of sensitive FBI information systems.]

Conclusion: [REDACTED]

[REDACTED] This will provide a unique visual stimulus for

reviewers and also help coordinate Agents, Analysts, and TFOs working on the same or different cases. [REDACTED]

If implemented prior to November 5, 2009, this revision would have allowed SD-Agent to create a means of flagging [REDACTED] communications in DWS-EDMS [REDACTED]. Like the other DWS-EDMS revisions, however, the [REDACTED] tool is limited [REDACTED]. As a result, the tool would not have flagged [certain of the Hasan-Aulaqi communications] [REDACTED], but it would have flagged [others] [REDACTED].

This revision is vital. It provides an automated backstop to assure that [REDACTED] [information is] not overlooked, as well as a means of notifying other Agents, Analysts, and TFOs [about information acquired] [REDACTED] in their cases, creating additional synergy across investigations.

4. [REDACTED] [Workload Reduction Tools]

STAS has developed [REDACTED] [workload reduction tools] to assist reviewers in evaluating [REDACTED] [DWS-EDMS information]. [REDACTED] [These tools] identify [certain email data] [REDACTED].

[The tools] do not replace human review [REDACTED] but prioritize [REDACTED] review based on potential importance. STAS is working with the FBI's Counterterrorism Division [REDACTED] to refine and test [these tools] [REDACTED].

The FBI has [REDACTED] [used these tools] in DWS-EDMS on high profile cases, including the Aulaqi investigation. [REDACTED]

Testing has revealed that [REDACTED]. The DWS-EDMS [REDACTED] [September 2011] release (see C.5 below) enables individual users to [REDACTED] [adapt these tools] for their individual cases.

STAS also initiated a pilot project to develop a DWS-EDMS [REDACTED] [tool] that would automatically identify [certain other email data] [REDACTED].

[REDACTED]. The [REDACTED] [tool] would not [REDACTED], but [would] assist reviewers in prioritizing products for review. [REDACTED]

STAS tested the [REDACTED] [tool] against the voluminous [REDACTED] [information acquired] in the Aulaqi investigation. Recent tests indicate that the [REDACTED]

■ [tool] is 96% to 98 % accurate ■. However, the ■ [tool] has not been implemented. At this writing, the project is on hold given the need to focus limited STAS resources on more pressing matters.

Conclusion: The ■ [tools] would assist users in organizing and prioritizing ■ [information] for review without placing additional time or review demands on reviewers. Its primary drawback is ■.

■

5. DWS-EDMS ■ [September 2011] Release

The ■ [September 2011] release of DWS-EDMS ■ is system evolution, not a remedy implemented as a result of the Fort Hood shootings. However, the ■ [September 2011] release resolved many of our concerns about DWS-EDMS. We discuss it briefly here.

The ■ [September 2011] release was deployed in beta format in May 2011 for feedback from a internal User Advocacy Group. Roughly 1,200 personnel given access to the application gave it an approval rating of 70%. Each user provided feedback, nearly all of which was incorporated into the application before its production release.

■ [The September 2011] release [is] the single common interface for all users. Training for the ten largest Field Offices was completed in December 2011. Feedback from the field has been overwhelmingly positive.

STAS deployed industry-leading third party tools for the development of [the] DWS-EDMS ■ [September 2011 release] ■. The ■ [September 2011] release includes a complete redesign of the user interface and resolves the performance and scalability issues that hamstrung earlier versions. It also provides Agents, Analysts, and Task Force Officers with automated analysis of cases and facilities as they work.

■

[REDACTED]

The [REDACTED] [September 2011] release deploys a new full text search capability- [REDACTED]

[REDACTED]

Conclusion: The [REDACTED] [September 2011] release is a vital improvement of DWS-EDMS that should ease and prioritize the workload of DWS-EDMS users. [REDACTED]

[REDACTED]

We believe that [REDACTED] [the September 2011 release] represents a significant step forward for the system's software. As discussed in Part Five, we believe that a comparable step forward is [needed] for the system's hardware.

D. Training

In March 2010, the FBI instituted Headquarters and NJTTF oversight of JTTF training to ensure uniformity and quality of training across JTTFs and to ensure that Task Force Officers (TFOs) complete training promptly upon joining a JTTF. A mandatory four-day orientation course introduces new TFOs from partner departments and agencies to the FBI and JTTFs, including procedures for conducting and documenting investigations. New TFOs are taught that working in an FBI environment makes them responsible, like FBI personnel, for complying with the governing authorities, including those designed to protect civil liberties and privacy interests. The training also ensures that all TFOs understand and, if appropriate, have access to FBI databases that contain information relevant to their JTTF responsibilities.

On April 13, 2011, the Assistant Director of the Counterterrorism Division (CTD) reaffirmed and expanded the training requirements for all JTTF personnel, whether FBI Special Agents (SA), Intelligence Analysts (IA), and Staff Operations Specialists (SOS) or TFOs. The expanded training consists of three components: Virtual Academy training, classroom training and database training.

1. Virtual Academy

CTD identified twelve Virtual Academy training modules as the baseline level of training for JTTF personnel:

- Joint Terrorism Task Force Orientation
- FBI Watchlisting
- FISA Accuracy
- Information Sharing Environment (ISE) Core Training

Information Systems Security Awareness
 Introduction to Domestic Terrorism
 Introduction to International Terrorism
 National Security Branch Introduction
 National Security Letters (NSL)
 Overview of Domestic Investigations and Operations Guide (DIOG)
 Overview of the Attorney General Guidelines for Domestic FBI Operations
 U.S. Persons and Information Sharing

These training modules are to be completed within 90 days after a SA, IA, SOS, or TFO is assigned to a JTTF. Personnel who do not complete this training within 90 days must complete all twelve modules immediately. Field Office executive management is required to ensure and document completion of the mandatory baseline Virtual Academy training modules.

2. Classroom Training

The NJTTF established the JTTF TFO Orientation & Operations Course (JTOOC) at Quantico to address TFO training needs. JTOOC is a five-day course designed to introduce TFOs to counterterrorism investigations. Classes are designed around a national counterterrorism case to assist discussion and interaction. All full-time TFOs, regardless of when assigned to a JTTF, who have not taken JTOOC are required to attend the course before October 2011. Part-time TFOs with unescorted access to FBI space and access to FBI computer systems are also required to attend the course. TFOs must complete all twelve baseline Virtual Academy training modules prior to attending JTOOC.

Field Office executive management is required to ensure that eligible TFOs assigned to their JTTF attend JTOOC and to document successful completion JTOOC by those TFOs.

3. Database Training

In 2010, in response to the FBI's initial Fort Hood investigation, CTD required that JTTF members to receive hands-on training on key FBI databases and systems, including the Data Warehouse System-Electronic Surveillance Data Management System (DWS-EDMS), Information Data Warehouse (IDW), Clearwater, and Automated Case Support (ACS)/Sentinel (see Part One, Chapter 4). In January 2010, a "train-the-trainer" session was conducted at Quantico. Each Field Office provided at least two trainers. These trainers then returned to their Field Office to train all TFOs, SAs, IAs and SOSs assigned to counterterrorism matters by March 2010. Training of JTTF members assigned after March 2010 is to be conducted within six months of access to FBI systems.

Conclusion: The FBI's post-Fort Hood enhancements of counterterrorism and JTTF training represent significant improvements. The critical shortfall before Fort Hood was the failure adequately to train Task Force Officers on their role as JTTF members and to provide them with knowledge about, and access to, FBI databases relevant to their responsibilities. We encourage the FBI to continue to focus on JTTF training in order to provide TFOs with all available tools and resources. It is also important to ensure that all TFOs understand that, regardless of their home agency, the FBI's governing authorities control their activities as JTTF members.

Part Four

Analysis of Governing Authorities

Existing Authorities

The Terms of Reference asked Judge Webster to “review ... whether current laws and policies strike an appropriate balance between protecting individual’s privacy rights and civil liberties and detecting and deterring threats such as that posed by Major Hasan.”

We discussed the FBI’s governing authorities in Part One, Chapter 3. We asked representatives of Congressional oversight staff (the Majority and Minority staffs of the Senate and House Judiciary and Intelligence Committees) and public interest groups (the American Civil Liberties Union and the American Enterprise Institute) to identify their concerns about the impact of the governing authorities on privacy rights and civil liberties.^{10/} This Chapter assesses those concerns in the context of the FBI’s responsibility to detect and deter terrorism.

We describe policy changes that the FBI has adopted. We also note areas that may need additional improvement or oversight. Congress is ultimately responsible for determining whether the appropriate balance exists. We believe our review will assist in that task.

The guiding principle of our analysis has been that, as the risk of potential infringement of individual privacy rights and civil liberties increases, the level of factual predication, supervisory approval, and oversight should increase. The FBI should monitor and report on its use of techniques that raise concern through OIC compliance reviews, Inspection Division audits, and National Security Division reviews. The FBI should modify or abandon policies and protocols that experience proves to be unacceptably harmful to privacy rights or civil liberties.^{11/}

^{10/} A letter to Judge Webster setting forth the ACLU’s concerns is attached as Exhibit 1.

^{11/} By letter dated December 9, 2010, Attorney General Eric Holder advised Senator Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary, that DOJ and the FBI would implement certain enhanced privacy and civil liberties protections proposed in S. 1692, 111th Cong. (2009), the USA PATRIOT Act Sunset Extension Act, as reported by the Judiciary Committee. The Attorney General advised that he was “confident that these measures will enhance standards, oversight, and accountability, especially with respect to how information about U.S. persons is retained and disseminated, without sacrificing the operational effectiveness and flexibility needed to protect our citizens from terrorism and facilitate the collection of vital foreign intelligence and counterintelligence information.” 157 Cong. Rec. S3,250 Ex. 1 (daily ed. May 24, 2011).

A. Standard for Opening Assessments/Investigative Techniques Used in Assessments

1. Background

The AG Guidelines authorized certain techniques in assessments that were not previously permitted during national security threat assessments, but were permitted for the “prompt and limited checking of leads” under the prior General Crimes Guidelines. The Attorney General promulgated this revision to better equip the FBI to detect and deter terrorist activity.

2. Concerns

To open an assessment, the FBI must identify its purpose in writing and that purpose must be “authorized,” i.e., within the Bureau’s mission. DIOG §§ 5.1-5.3. Critics are concerned that this standard authorizes the FBI to conduct assessments without any factual predicate suggesting the target’s involvement in illegal activity or threats to national security. They believe the AG Guidelines and DIOG should require some factual predicate to avoid collecting and retaining information on individuals who are not engaged in wrongdoing.^{12/}

A corresponding concern is that the AG Guidelines allow the FBI to use investigative techniques during an assessment that some regard as intrusive; for example, physical surveillance, recruiting and tasking informants to attend meetings under false pretenses, and engaging in “pretext” interviews in which Agents do not disclose their FBI affiliation and/or the purpose of the interview.

Commenters also believe the AG Guidelines “explicitly authorize the surveillance and infiltration of peaceful advocacy groups” prior to demonstrations and “open the door to racial profiling.” Letter from Laura W. Murphy, Director, ACLU Washington Legislative Office, and Anthony D. Romero, Executive Director, ACLU, to Hon. William H. Webster (August 6, 2010) at 7. They believe the AG Guidelines should be amended to provide stronger protection of First Amendment activity and to ban racial profiling.

^{12/} Based on data obtained from the FBI under the Freedom of Information Act, a recent news article reports that the FBI opened 82,325 Type 1 & 2 assessments of persons or groups between March 25, 2009, and March 31, 2011. Charlie Savage, F.B.I. Focusing on Security Over Ordinary Crime, *New York Times*, August 24, 2011, at A16. Information collected in those assessments led to 3,315 preliminary or full investigations that remained open as of May 2011. The FBI also opened 1,819 Type 3 assessments during that period to identify particular threats in particular geographic areas. 1,056 remained open in May 2011. Based on this data, the ACLU has expressed concern that the FBI is “casting its investigative net too broadly” and that the assessment authority granted by the AG Guidelines is “far too broad.” *Id.* Valerie Caproni, then-FBI General Counsel, noted that the data showed that the FBI had disposed of about 96 % of the assessments using “low intrusion techniques” without opening a potentially more invasive preliminary investigation. *Id.*

3. Evaluation

We believe that the increased flexibility under the AG Guidelines to conduct assessments using specified techniques is critical to the FBI's ability to combat terrorism. The FBI's evolving role as an intelligence agency demands anticipation rather than reaction. If the Bureau's ability to gather information were limited to circumstances of specific factual predication, then in many cases it would not be able to identify and prevent threats before they escalate into action. Without the ability to gather and analyze intelligence, the FBI would be primarily reactive, investigating crimes and terrorist acts after they occur.

We recognize, however, that the AG Guidelines standard for opening counterterrorism assessments and conducting investigative activity can lead to the collection of information about individuals who turn out not to have been involved in any illegal or terrorist activity. We discussed this issue with the FBI and reviewed its safeguards for minimizing the collection and retention of such information.

First, the DIOG prohibits assessments based on "arbitrary or groundless speculation"; solely on the exercise of First Amendment rights; solely on the race, ethnicity, national origin, or religious practice of any person or group; or on a combination of only these factors. These front-end prohibitions are closely enforced and monitored by the FBI.

Second, the Privacy Act prohibits the retention of information about how First Amendment rights are exercised unless it relates to criminal activity or a national security threat. See 5 U.S.C. § 552a(e)(7). FBI policy sets out procedures for removing information from FBI records that does not comply with the Privacy Act. See Corporate Policy Notice 0356N, Handling of Information Gathered in Violation of the Privacy Act (effective June 9, 2011).

Third, as noted in Chapter 4, the FBI's Guardian Threat Tracking system is an access-controlled classified database that provides terrorism threat tracking and management for all Type 1 & 2 assessments and all incidents with a potential nexus to terrorism (including those that lead to predicated investigations). FBI policy requires the entry of all terrorism-related threats, events, and suspicious activities into Guardian. The Guardian Management Unit (GMU) is responsible for administering the system and for ensuring that all policies involving the types of information that can be entered into Guardian are followed. GMU's Assessment Review Team (ART) reviews each Guardian assessment to ensure that there was a sufficient basis to open the assessment (*i.e.*, an authorized purpose not based solely on protected rights or characteristics); that only authorized techniques are used; and that all applicable DIOG and FBI policies are followed, including those policies that proscribe the retention of information that is inconsistent with the Privacy Act. When ART identifies a compliance issue, it follows up with the Field Office involved and is authorized to seek the removal of improperly collected or retained information from FBI systems.

Fourth, the FBI has initiated the process to shorten the 30-year retention period for information collected through Guardian leads. Under the new policy, this information will be accessible for five years. If there are no "hits" against the information, it will be available only on a restricted basis for an additional five years. Users will receive notification of any hit, but will need to obtain a supervisor's permission to access the information. If there are no hits after

ten years, the information will be removed from the system. Under the Federal Records Act, the FBI is required to obtain approval of the change through the National Archives and Records Administration.

Fifth, FBI policy requires that reviewing Agents who determine conclusively that no nexus to terrorism exists must note "No nexus to terrorism" when closing a Guardian lead. This serves two purposes. If the FBI receives similar complaints involving the individual or group, reinvestigation may not be necessary. If the subject becomes involved in illegal or terrorist activity, there will be a record of the previous encounter.

There is also oversight. Type 3 through 6 assessments require the approval of a Supervisory Special Agent or Supervisory Analyst, who must be satisfied that (1) the basis of the assessment is well-founded (which typically means supported by source information, intelligence reporting, information from other agencies or foreign partners, or public source data); and (2) there is a rational relationship between the stated purpose of the assessment, the information sought, and the means proposed to obtain that information. Type 1 & 2 assessments, which involve the prompt and limited checking of leads, do not require supervisory approval unless they involve a "sensitive investigative matter" (SIM). A supervisor must assign Type 1 & 2 assessments, which requires the supervisor to review the assessment. He or she must close the assessment if there is no valid basis for action.

In addition, all assessments are subject to regular file reviews at least four (4) times per year in which the supervisor must determine whether the assessment should remain open.¹³ Legal counsel and the Special Agent in Charge (SAC) must review and approve any assessment involving a SIM, which includes investigations of domestic public officials or political candidates involving corruption or threats to national security; religious or domestic political organizations (including organizations formed to advocate or educate the public about a political or social issue) and persons prominent in them; the news media; an investigative matter having an academic nexus; and any other matter that in the judgment of the official authorizing the investigation should be brought to the attention of FBI Headquarters. DIOG 2.0 §§ 10.2.1, 10.1.3. Further, the technique(s) used in all assessments and predicated investigations must be the least intrusive feasible means, that are operationally sound and effective, of securing the desired information sufficient to meet the investigative objective (for example, physical surveillance should not generally be used when accurate information can be obtained from public sources). DIOG § 4.4; see also AG Guidelines I(C)(2)(a); Exec. Order No. 12333 at § 2.4 (Dec. 4, 1981). DIOG 2.0 § 10.1.3 requires that "particular care" should be taken in a SIM when considering whether the planned course of action is the least intrusive means.

Certain assessment techniques deserve discussion. Although expressed concerns about these techniques have focused on their use in assessments, some extend to their use in predicated investigations.

^{13/} When the DIOG became effective, OIC instituted a compliance monitoring program that required operational program managers to review 10 assessments per program per week to ensure compliance with the DIOG. That program was discontinued in light of the positive results of the Inspection Division's 2009 audit of the FBI's use of assessments and the Inspection Division's plans to conduct future audits of DIOG compliance.

Physical Surveillance. Physical surveillance can occur only in areas where there is no constitutionally protected expectation of privacy and requires an articulated purpose and a supervisor's authorization. There is a [redacted] [time] limit on physical surveillance. DIOG § 5.9.B.2. [Each request of physical surveillance must be justified and approved by a supervisor.]

[The redacted portions contain information that would disclose techniques and procedures for law enforcement investigations and prosecutions.] The goal of these controls is to permit Agents to respond to leads quickly and effectively or to obtain the limited factual information necessary to achieve the purpose of the assessment while precluding long-term, continuous surveillance of a person's lifestyle or habits when there is no basis for opening a predicated investigation.

Source Recruitment. To facilitate the prompt and limited checking of leads, the prior General Crimes Guidelines authorized recruiting and tasking sources without an open investigation; but the AG Guidelines for FBI National Security Investigations and Foreign Intelligence Collection prohibited these techniques during national security threat assessments. The DIOG, based on the authority provided by the Attorney General Guidelines, authorizes these techniques for assessments across all FBI investigative programs. Source recruitment, vetting, and validation are critical to the FBI's success as an intelligence agency. Although the AG Guidelines expanded the range of techniques available for source recruitment (to include use of false identification, voluntary polygraph examinations, and searches that do not require a court order), the FBI did not authorize use of these other techniques until it finalized policies governing their use.

Interviews. In its discussion of least intrusive means, the DIOG recognizes that an FBI interview of an individual's employer, family, or other acquaintances could, in certain circumstances, create a risk of harm to the individual arising from the contact itself or the information sought. DIOG § 4.4.C.5. In recognition of this risk, the FBI has cautioned its personnel that, when determining the least intrusive means, they should consider the intrusiveness of conducting an interview of a subject's employer (among others). *Id.* Consistent with this guidance, the Supervisory Special Agent and Task Force Officer (TFO) who conducted the Washington, D.C., JTIF assessment of Nidal Hasan cited the potential adverse impact on his military career as a reason they did not contact his superiors at Walter Reed Army Medical Center. We recognize that Agents and TFOs face a difficult task in balancing the competing interests in this situation. If no interviews are conducted, they risk being criticized for failing to act to prevent harm. If they conduct an interview and harm to the individual results, they risk criticism for causing that harm. We believe that the DIOG's existing guidance is appropriate, and we encourage the FBI to remain sensitive to minimizing potential harm when conducting interviews.

"Pretext" Interviews. FBI policy limits the circumstances in which Agents may conduct an interview without affirmatively disclosing their FBI affiliation or the purpose of the interview. DIOG § 5.9.F.4. During an assessment [redacted]

Undisclosed Participation. Pursuant to Executive Order 12333, no one acting on behalf of the U.S. Intelligence Community may join or otherwise participate in an organization in the U.S. without disclosing his or her affiliation except in accordance with procedures approved by the Attorney General. On November 26, 2008, the Attorney General, in consultation with the Director of National Intelligence, signed the policy that governs the undisclosed participation (UDP) of FBI employees and sources in U.S. organizations and business entities. The DIOG incorporates this policy. DIOG § 16.1.A. [REDACTED]

In light of the sensitivity of UDP activity involving religious [, advocacy, and similar] organizations, we examined FBI policy governing that activity. We learned that the level of required approval is generally proportional to the intrusiveness or sensitivity of the activity.

DI0G 2.0 §§ 16.1.3, 16.3.

[REDACTED]

[The redacted portion sets forth the escalating approvals required by FBI policy for UDP; the more sensitive the activity, the higher the approval level. These approvals may include a Supervisory Special Agent, Chief Division Counsel, or other DOJ or FBI lawyers, a Special Agent in Charge, an FBI Assistant Director, or the Director.]

Given this infrastructure and heightened approval levels, we believe that the FBI has appropriately balanced the protection of national security with privacy rights and civil liberties in its use of UDP. We recommend, however, that OIC and the Inspection Division monitor the FBI's use of UDP in these contexts to ensure that the balance holds.

Racial Profiling. Racial profiling, or the invidious use of race or ethnicity as the basis for targeting suspects or conducting stops, searches, seizures, and other investigative procedures, has no place in law enforcement. It is an unconstitutional and ineffective law enforcement tool. It is also prohibited by FBI policies. The DIOG incorporates the DOJ Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, which prohibits racial profiling and describes the limited circumstances in which law enforcement may consider race or ethnicity. Chapter 4 of the DIOG provides extensive guidance designed to prevent racial or ethnic profiling. It prohibits the use of race or ethnicity as the primary, dominant, or sole factor in commencing an assessment or investigation.

Race and ethnicity may be used as a specific identifier of a suspect based on credible information. If the FBI receives a lead that a short, white male robbed a bank, the FBI can limit the pool of suspects to short, white males without running afoul of prohibitions on racial or ethnic profiling. Race or ethnicity also may be considered if it has an explicable and well-founded nexus with the threat or group being assessed or investigated; for example, some

criminal gangs and terrorist organizations consist exclusively or primarily of persons of a common ethnic background.

The prohibition of investigative activity based solely on race or ethnicity also applies to the collection of racial/ethnic demographics and behavioral characteristics. The DIOG allows collection of this information only for limited purposes, such as furthering intelligence analysis and planning around potential threats and vulnerabilities.^{14/}

Undercover Operations and Activities.

[REDACTED]

[The redacted portion describes the various FBI committees that must approve undercover counterterrorism operations and activities involving sensitive circumstances; one committee includes mid-level FBI managers, and the other includes senior executives (discussed below). Both include lawyers from the DOJ.]

At the Director's request, the FBI also established the Sensitive Operations Review Committee (SORC) chaired by the [REDACTED]. Its members include Assistant Directors or designated Deputy Assistant Directors for various investigative divisions, [REDACTED] and the Assistant Attorneys General of the [REDACTED] or their senior level designee. Advisors include the FBI Corporate Policy Office and DOJ Chief Privacy and Civil Liberties

^{14/} For example, collecting demographics about a concentrated ethnic community could enable a Field Office to assess and mitigate the threat posed by an ethnically-identifiable terrorist organization's efforts to recruit new members from that community. The data could also be mapped to enable the identification of otherwise imperceptible connections. Moreover, knowing that terrorist groups recruit members from a certain region of the ethnic group's home country (ethnic behavioral information) would be relevant to the assessment [REDACTED]. In these examples, the rationale for collection is not based solely on the community's ethnicity. Because of the potential risk of harm to civil rights and liberties in the collection of such information, we recommend that OIC and the Inspection Division monitor these collections to ensure that harm does not occur.

Officer or a designee. The SORC reviews and makes recommendations to the Director on sensitive operations and initiatives (whether assessments or investigations), including sensitive UDP; for example, the SORC reviewed a proposed undercover operation during an investigation that would attract predicated subjects but also might require substantial interaction with members of the general public. The DIOG requires notice to the SORC of less sensitive operations and initiatives to ensure high-level monitoring, trend evaluation, and reports to higher authority. This level of review is important for sensitive activities during assessments, which are limited; for example, undercover activity is not allowed in an assessment.

In certain recent counterterrorism cases, the FBI used a CHS or an undercover FBI employee (UCE) in dealing with individuals who were later arrested. Given concerns about whether CHS or UCE use in these circumstances comports with the law and judicial precedent on entrapment, we examined FBI policy. The FBI uses CHSs and UCEs to gather intelligence in ongoing predicated investigations; more rarely, a CHS (but not UCE) may report on the subject of an assessment. FBI personnel who approve CHS and UCE use are obligated to assure there are safeguards to protect the rights of those affected. When the FBI receives an allegation or lead indicating that an individual may be planning or is interested in committing a terrorist act, the FBI structures and monitors the investigation to confirm the subject's required predisposition to engage in criminal activity and to avoid unlawful entrapment. This is accomplished in part by involving FBI and National Security Division attorneys (as well as a local AUSA) when the disruption plan may involve a criminal prosecution. The attorneys evaluate the prospect of prosecution and[if so,] how best to conduct the investigation to enhance the likelihood of success while ensuring that individuals are not lured into criminal activity. This may include, for example, providing the subject with clear opportunity to opt out of criminal conduct.^{15/}

Given the substantial involvement of FBI and DOJ attorneys and the required higher levels of approval, we believe the FBI's use of undercover operations and activities in counterterrorism investigations is properly administered. We also believe that the rights of individuals not involved in or predisposed to terrorist or criminal activity are safeguarded. We recommend, however, that OIC and the Inspection Division monitor undercover operations and activities, including CHS and UCE use, in counterterrorism investigations to ensure that those rights continue to be protected.

DIOG 2.0. Concerns also have been expressed that certain DIOG 2.0 revisions provide the FBI with leeway to infringe privacy rights. For example, there is concern that permitting Agents to search commercial or law enforcement databases (i.e., a "record check") before an assessment is opened without making a record of the inquiry could result in inappropriate use of databases. The purpose of this change, however, was to enable Agents to run quick checks on individuals (for example, in response to a citizen complaint) and resolve unfounded complaints while preserving resources and minimizing the impact on the subjects of complaints. DIOG 2.0

^{15/} To assure their reliability, all new CHSs are subject to an extensive investigation of their background, access to information, and character [as well as periodic validation].

§ 5.1.2 requires that "FBI employees must document and retain records checks . . . if, in the judgment of the FBI employee, there is a law enforcement, intelligence or public safety purpose to do so." Otherwise, the results of record checks cannot be retained. [REDACTED]

[REDACTED] [Also, widespread media reports have invited public scrutiny of the FBI's possible use of voluntary lie detector tests and trash covers when evaluating a potential informant, the multiple use of surveillance squads in an assessment, and the number of times Agents or informants can attend group meetings before the UDP rules apply. Any such changes would be] [REDACTED] within the scope of authority granted by the AG Guidelines. The FBI imposed restrictions on using [REDACTED] [certain] techniques until policy guidance could be developed. However, given the potential risks to civil liberties and privacy, we recommend that OIC and the Inspection Division monitor the use of the additional investigative techniques authorized by DIOG 2.0 to ensure that a proper balance has been struck.

* * *

Based on this combination of controls, we believe that assessments using the authorized techniques should not result in the intrusive collection or retention of personally identifiable information about large numbers of U.S. persons for impermissible reasons or infringe privacy rights or civil liberties.

Our conclusion is supported by an Inspection Division audit of all Type 3 through Type 6 assessments pending in 2009 in seven compliance areas: monitoring of First Amendment activities; collection of information based on protected characteristics; assessments based solely on FBI national or field office collection requirements; identification of assessments as SIMs; approval for undisclosed participation; approval of authorized investigative methods; and use of prohibited investigative methods.

Of the 3,426 assessments evaluated, only 178 (5.2%) had one or more of a total of 218 compliance errors. No assessment collected information based on protected characteristics. The 218 compliance errors involved identification of assessments as SIMs (158); FBI Headquarters and Field Office collection requirements (35); approval of authorized investigative methods (17); monitoring of First Amendment activities (3); approval for UDP (3); and use of prohibited investigative methods (2). Of the 218 errors, 213 (98%) were administrative and primarily involved Field Office failure to recognize and designate an assessment as a SIM (158 errors) or assessments based solely on collection requirements (35 errors). The other five errors were substantive and mainly involved initiating an assessment or retaining information during an assessment that appeared to be based solely on First Amendment activities. The audit determined whether those assessments were based on an authorized purpose and collected information related to that purpose. The FBI closed assessments that were not in compliance and/or removed and sequestered the information collected.

In September 2010, OIG reported on the FBI's investigation of domestic advocacy groups. OIG found no evidence that the FBI had targeted any group or individual based on First

Amendment activities. The report concluded that the FBI had generally predicated the investigations on concerns about potential criminal acts rather than First Amendment views. OIG found that the FBI's purpose for attending a 2002 anti-war rally fulfilled the AG Guidelines, but that FBI statements to Congress and the public tying attendance to an FBI subject were inaccurate and misleading. OIG criticized the factual basis for opening or continuing domestic terrorism investigations of certain non-violent advocacy groups and questioned classifying some cases as domestic terrorism and opening some investigations as full rather than preliminary. OIG also found instances of questionable investigative techniques and improper collection and retention of First Amendment information.

The report noted that the AG Guidelines had loosened prior limitations on FBI retention of information collected in connection with public events, which had been prohibited unless related to potential terrorism or criminal activity. OIG recommended that the FBI consider reinstating the prohibition. In a September 14, 2010, letter from Deputy Director Timothy P. Murphy to the Inspector General, the FBI concurred with this recommendation and the report's other recommendations.^{16/}

4. Recommendations

Although we conclude that the AG Guidelines standard for opening an assessment and the available investigative techniques strike an appropriate balance, privacy rights and civil liberties may be implicated. We recommend that OIC and the Inspection Division conduct compliance reviews and audits on a regular basis – at least annually, for a period of three years – of the FBI's use of assessments and the investigative techniques used to ensure compliance with policies and procedures that guard against the inappropriate use of race, ethnicity, national origin, or religion as a basis for investigative activity and to identify any concern about or impact on privacy rights and civil liberties.

Because assessments may collect information that has no current investigative value, we further recommend that the FBI strictly adhere to policies to ensure that personnel do not access or view this information without a legitimate law enforcement or intelligence reason. These policies include the requirement that any investigative activity – including activity involving assemblies or associations of U.S. persons exercising their First Amendment rights – must have an authorized purpose under the AG Guidelines that is rationally related to the information sought and the technique to be employed. DIOG § 4.2.D. We recommend that the FBI apply these policies with particular focus – and OIC monitoring – on information gathered during

^{16/} Information concerning the exercise of First Amendment rights by U.S. persons may be retained only if pertinent or relevant to FBI law enforcement or national security activity. DIOG 1.0 § 5.13; DIOG 2.0 § 5.12. DIOG 2.0 § 4.1.3 provides that documents describing First Amendment activity that are determined to have been collected or retained in violation of the Privacy Act must be destroyed, citing Records Management Division Policy Notice 0108N. The Privacy Act forbids federal agencies from collecting information about how individuals exercise their First Amendment rights, unless authorized by statute or by the individual, or it is pertinent to and within the scope of authorized law enforcement activity.

assessments that implicates privacy interests or civil liberties or that relates to First Amendment activities or other Constitutional rights.¹⁷⁷

B. National Security Letters

1. Background

After the PATRIOT Act revised the standard for issuing National Security Letters (NSLs) to “relevance to an authorized investigation” and the FBI significantly increased the number of Special Agents assigned to counterterrorism, the FBI’s use of NSLs increased from 8,500 in 2000 to an average of about 19,000 per year from 2008 to 2010. The FBI has used information obtained through NSLs to determine whether further investigation is needed; to generate leads for Field Offices, JTTFs, and other federal agencies; to prepare FISA applications; to corroborate information developed through other investigative techniques; and to clear individuals suspected of posing a threat to the national security.

In 2006, Congress amended the NSL statutes to provide the government with explicit enforcement authority and to respond to, among other things, the Southern District of New York’s decision in *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), and other judicial decisions that had questioned the constitutionality of the non-disclosure provisions. The amendments also required two DOJ Inspector General (OIG) audits of the FBI’s use of NSL authority.

2. Concerns

The OIG audits shaped much of the public perception of NSLs. The OIG’s March 2007 report found that, prior to 2007, the FBI had inadequate internal controls on NSLs and had not adequately trained personnel to understand the intricacies of the statutes. These inadequacies led to a small, but not insignificant, number of NSLs being issued inappropriately. The OIG’s March 2008 report noted that the FBI had made significant progress in rectifying the problems identified in 2007. The OIG found no intentional violations of the governing authorities, although one Headquarters unit had circumvented protections in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986), by issuing over 700 “exigent

¹⁷⁷ Although our recommendation concerns information gathered during assessments, the FBI should consider monitoring its compliance policies for all information collected that lacks current investigative value and implicates privacy rights and civil liberties. We considered whether front-end access control procedures similar to the NSL Procedures discussed below should apply to such information. We determined that those protocols would not be practical because the limited search capabilities of the FBI’s current technology could effectively render information stored in a discrete database inaccessible. Data aggregation and integration of lawfully obtained information are critical to the FBI’s counterterrorism mission. The need for strict compliance and OIC monitoring is underscored by recent news reports that the ACLU has obtained documents from the FBI through the Freedom of Information Act that reflect the improper retention of First Amendment activity information in violation of the Privacy Act. *Washington Post*, Dec. 2, 2011, at A3.

letters” for telephone billing information. That unit’s actions were the subject of a 2010 OIG report. The FBI had prohibited the use of exigent letters before OIG issued its 2007 report.

Critics believe the PATRIOT Act unwisely loosened the nexus between the information sought by an NSL and the factual basis for suspecting activity that threatens national security. They say the statutory standard (“relevance to an authorized investigation”) permits the FBI to obtain records about subjects with no ties to an agent of a foreign power (for example, a terrorist organization). These critics believe the FBI should have reason to believe that the subject of the records has some connection to an agent of a foreign power or to his or her activities. Critics also argue that certain transactional records such as to-and-from calling information should be available only with a Section 215 court order or a grand jury subpoena because these records are more sensitive than basic subscriber information (name, address, and billing information). Critics suggest that the statutory non-disclosure provisions are overbroad and should be amended to reflect *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008); require the government to demonstrate that national security would be harmed in the absence of the non-disclosure order; and automatically nullify the order when the threat ceases to exist.

The Senate Judiciary Committee proposed legislation in 2010 (S. 1692) to address certain concerns about NSL authority by (1) allowing the recipient of a non-disclosure order to challenge that order at any time; (2) requiring the FBI to retain a statement of facts showing that the information sought is relevant to an authorized investigation; and (3) requiring the Attorney General to establish procedures for the handling of NSL-obtained information. The proposed legislation would have included a four-year sunset provision.

3. Evaluation

These concerns are important. We are satisfied, however, that the FBI has implemented procedures and policies to resolve the compliance issues identified by the OIG. The most significant solutions are the addition of an automated NSL workflow subsystem to the computerized FISA management system and the implementation of the NSL Procedures.

NSL Subsystem. The NSL subsystem became operational in all Field Offices and Headquarters on January 1, 2008. It is used to generate and seek approval of most NSLs, and ensures that the FBI can issue NSLs only after invoking the appropriate statutory authority, obtaining all required approvals (including legal review), and opening an investigative file in accordance with the AG Guidelines. No NSL prepared in the subsystem can be approved or issued without all requisite information, such as the subject of the NSL, the predication, the type of NSL requested, the recipient, and the target(s). (With OGC approval, limited categories of NSLs can be created outside of the subsystem. Separate procedures, including a regular review of those NSLs, promote compliance with statutory and policy requirements.)

The FBI supplemented the NSL subsystem with published guidance that stresses the least intrusive means doctrine and defines the scope of review by FBI attorneys and signatories. FBI attorneys must review a proposed NSL to determine whether the data sought is relevant to a national security investigation, and the investigation appears to be properly predicated. The signer of the NSL, generally the SAC or Acting SAC of a Field Office, must determine whether the information is relevant to the investigation, the investigation appears to be adequately

predicated and, if applicable, there is a valid basis to impose a non-disclosure requirement. Because the NSL subsystem is role-based, only persons with identified authority can approve NSLs. The Inspection Division periodically samples NSLs to confirm, among other things, that NSLs are properly authorized.^{18/}

NSL Procedures. In response to the OIG's 2007 report, Attorney General Gonzales convened a NSL Working Group to examine (1) minimizing the retention and dissemination of NSL-derived information; (2) "tagging" (segregating or marking) NSL-derived information in databases for tracking and, if necessary, deletion; and (3) limiting the retention of NSL-derived information. On October 1, 2010, Attorney General Holder approved the Working Group's proposed National Security Letter Procedures. The FBI incorporated the Procedures into DIOG 2.0. DIOG 2.0 § 18.6.6.3.12.

The NSL Procedures govern the collection, use, and storage of NSL-derived information and are designed to ensure that only those records that may have "investigative value" are included in the Automated Case Support (ACS) system, which houses FBI investigative case files and is generally available to almost all FBI employees with investigative or analytic responsibilities. (Having "investigative value" means the information responds to or creates a new investigative need, contributes to an intelligence collection requirement, or has the reasonable potential to provide other FBI or Intelligence Community employees information of value, consistent with their mission.)

The NSL Procedures require FBI employees to determine that material uploaded to ACS is responsive to the NSL and will serve the goals of the investigation or reasonably can be expected to serve the goal of other investigations. Only NSL-derived information that is responsive to the NSL and which has potential investigative value may be uploaded to ACS. However, all NSL-derived information may be entered temporarily as electronic files on the hard drives of desktop computers to determine whether it is responsive and has investigative value. Because desktop computers are accessible only with a password, other employees cannot access information stored on the hard drives. All records that lack current investigative value, but which fall within the scope of the NSL request, are preserved in the physical file (with controlled access) to ensure that, in the event subsequent information or analysis renders the records relevant to an FBI investigation or Intelligence Community need, they will be accessible.

^{18/} The Inspection Division evaluated the effectiveness of the NSL subsystem by auditing random samples of 699 NSLs issued in 2008; 1,560 NSLs issued in 2009; and 1,499 NSLs issued in the first half of 2010. The audits also included all NSLs created outside of the NSL subsystem. The Inspection Division determined that six (0.9%) of the 2008 NSLs, ten (0.7%) of the 2009 NSLs, and eleven (0.7%) of the 2010 NSLs had errors requiring a Possible Intelligence Oversight Board (PIOB) violation referral to the OGC and the National Security Law Branch. The errors were classified into three principal types: improper authorization (5), overproduction and unauthorized use (10), and substantive typographical error (4). A few administrative errors resulted from FBI policy lapses that did not rise to a PIOB violation. The overall administrative error rate was 4.7% for 2008; 0.9% for 2009; and 0.1% for the first half of 2010. The FBI attributes the significant reduction in errors to the NSL subsystem.

The NSL Procedures contemplate the potential creation of a discrete, secure database for storing and analyzing financial information to identify connections of interest that might not otherwise be apparent. Any such database would have access controls, an established access policy, and an audit capacity to monitor compliance.

Documentation and Non-Disclosure Provisions. The DIOG also requires the FBI to prepare and retain a statement of facts showing (1) that the NSL seeks information relevant to an authorized investigation; and (2) if applicable, the need for a non-disclosure order. DIOG § 11.9.3.E. As of February 2009, all NSLs that invoke the non-disclosure provisions must include a notice informing recipients of the opportunity to challenge the non-disclosure requirement through government-initiated judicial review. The NSL subsystem automatically generates this notice. *Id.* If a recipient unsuccessfully challenges a non-disclosure order, the FBI will review the continued need for non-disclosure and notify the recipient when compliance with the order is no longer required. Thus far, there have been only four challenges to non-disclosure. In two challenges, the FBI permitted the recipient to disclose its receipt of an NSL.

In our view, the FBI's implementation of OIG's recommendations, adoption of the NSL subsystem, policy guidance, and the NSL Procedures provide an appropriate balance between the FBI's national security needs and privacy rights and civil liberties. We recognize that the PATRIOT Act's "relevance to an authorized investigation" standard can produce NSLs that acquire information that later proves irrelevant to national security investigations. However, this standard enhances the FBI's ability to acquire and assess intelligence in an effective and timely manner and matches the standard that applies in criminal investigations. Moreover, NSLs can be issued only in predicated investigations, not in assessments, thus assuring their use only in investigations involving suspected criminal or terrorist activity.^{19/}

4. Recommendation

To ensure that the FBI's procedures minimize the risk to privacy rights and civil liberties, OIG and the Inspection Division should regularly conduct, as experience indicates, compliance reviews and audits of the FBI's use of its NSL authority and the efficacy of the document control and access procedures.

^{19/} OIG is reviewing NSL use from 2007 to 2009 and the FBI's progress in responding to earlier OIG recommendations. OIG also intends to examine the NSL subsystem. The DOJ National Security Division and OGC monitor the FBI's use of NSLs and the document handling procedures as part of periodic National Security Reviews. In addition, DOJ and the Office of the Director of National Intelligence will soon complete the joint report to Congress on NSL minimization required by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

C. FISA Section 215 Business Records Authority

1. Background

FISA Section 215 business records authority is a national security tool parallel to criminal discovery tools (for example, grand jury subpoenas). The operational requirements of most national security investigations require the secrecy afforded by FISA rather than the more limited confidentiality available in criminal investigations.^{20/}

2. Concerns

Critics say that Section 215, like the NSL statutes, uses a standard (“relevance to an authorized investigation”) that inappropriately loosens the nexus between the order sought and the factual basis to suspect activity that threatens the national security. They also suggest that the statutory presumption of relevance to an authorized investigation – which applies if the government shows that the records sought pertain to (a) a foreign power or the agent of a foreign power; (b) the activities of a suspected agent of a foreign power who is the subject of an authorized investigation; or (c) an individual in contact with, or known to, an agent of a foreign power who is the subject of an authorized investigation – is unnecessary and enables the government to secure FISC approval without providing facts to support the request.

The Senate Judiciary Committee proposed legislation in 2010 (S. 1692) that would have addressed these concerns by (1) removing the statutory presumption of relevance; (2) requiring the government to provide a statement of facts to the FISC supporting its belief that the records sought are relevant to an authorized national security investigation; (3) heightening the standard for library circulation/patron lists (“reasonable grounds to believe the tangible things [sought] are relevant to an authorized national security investigation and pertain to (a) an agent of a foreign power, (b) the activities of a suspected agent of a foreign power, or (c) an individual in contact with or known to such an agent”); and (4) authorizing the FISC to review compliance with the minimization procedures.

Critics also argue that Section 215 runs afoul of the Fourth Amendment by allowing the government to obtain records by showing “relevance to an authorized investigation” rather than “probable cause.” However, a Section 215 order is not a “search” within the meaning of the Fourth Amendment. *E.g., Zurich v. Stanford Daily*, 436 U.S. 547, 563 (1978) (grand jury subpoenas “do not require proof of probable cause”); *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 195 (1946) (orders for the production of records “present no question of actual search and seizure”).

^{20/} From 2001 to 2010, the FISC issued more than 380 Section 215 orders. Nearly half of these orders were issued in 2004-2006 in tandem with FISA pen register orders because a statutory anomaly prevented automatic acquisition of subscriber identification information associated with telephone numbers identified by the pen register/trap-and-trace. Congress corrected this deficiency in the USA PATRIOT Act Additional Reauthorizing Amendments of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006). The other Section 215 orders obtained hotel, rental car, shipping, and similar records.

3. Evaluation

Congress built safeguards against misuse into Section 215. Section 215 orders are more protective of civil liberties than the grand jury subpoenas routinely issued by federal prosecutors. Section 215 orders, like grand jury subpoenas, can only seek records relevant to an authorized investigation; but a Section 215 order requires court approval, while a prosecutor can issue a subpoena without judicial review. Moreover, a Section 215 order may not issue if the investigation of a U.S. person is conducted solely on the basis of First Amendment activities. Finally, Section 215 requires the DOJ to submit detailed reports to Congress about its use.^{21/}

Congress added further safeguards to Section 215 in the Reauthorization Act of 2006, requiring high-level FBI approval (Executive Assistant Director for National Security) before a Section 215 order could be sought for “library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person.” 50 U.S.C. § 1861(a)(3). Congress also added procedures allowing the recipient of a Section 215 order to challenge its validity and the basis for its non-disclosure requirement by appeal to the FISC. To date, no recipient of a Section 215 order has challenged its validity.

Consistent with prior FBI policy and FISC practice, the DIOG does not rely on the presumption of relevance; it requires the preparation and retention of a written statement of facts supporting all Section 215 business records applications to the FISC. DIOG 2.0 § 18.6.7.3.3. DOJ, in consultation with the FISC, is developing minimization procedures to replace the interim procedures governing the handling of materials obtained under Section 215.

We believe that FISA’s protective provisions and the FBI’s policy guidance appropriately balance national security investigative needs with privacy rights and civil liberties. We recognize that the “relevance to an authorized investigation” standard can result in the acquisition of information that proves irrelevant to national security investigations. That standard is necessary, however, to ensure that the FBI can acquire and assess intelligence in an effective and timely manner. As Attorney General Holder has noted, 50 U.S.C. § 1861(b)(2)(B) requires minimization procedures for Section 215 orders. The FBI is operating under interim procedures pending the FISC’s adoption of formal procedures. We endorse the DOJ’s effort to finalize proposed formal procedures. We anticipate that those procedures will minimize the risk that access to irrelevant information may pose to civil liberties and privacy interests. Finally, the NSD will continue to monitor the FBI’s use of Section 215 authority and its application of minimization procedures.

^{21/} In March 2007 and March 2008, OIG reported on FBI Section 215 use in 2002-2006. OIG identified no illegal use of the authority, but reported four instances of overproduction resulting from inadvertence or telephone company error. OIG is scheduled to review Section 215 use in 2007-2009 as well as actions in response to its recommendation that the Attorney General adopt minimization procedures for Section 215 information (which has not yet occurred).

4. **Recommendation**

Based on the FBI's operational experience and given these safeguards, we believe that Section 215 should remain in effect. FBI national security investigators need the ability to obtain records that are outside the scope of the NSL statutes when working in an environment that precludes the use of less secure criminal authorities. Moreover, criminal authorities may be unavailable when an investigation is not focused on a violation of criminal law. As in the past, many requests will be mundane, such as seeking driver's license information that state law protects from disclosure. Other requests will be more complex, such as the need to track the activities of targets through their use of business services. The availability of the FISC-supervised business records authority is an appropriate way to advance national security investigations in a manner that protects civil liberties and privacy interests. The absence of this authority could force the FBI to sacrifice key intelligence opportunities, to the detriment of the national security.

To ensure that FBI policies and procedures are effective in minimizing the risk, OIC and the Inspection Division should regularly conduct, as experience indicates, compliance reviews and audits of the FBI's use of the Section 215 business records, adherence to Section 215 minimization procedures, and use of pen registers and trap-and-trace authority.

D. **Roving Surveillance Authority**

1. **Background**

The FBI's roving surveillance authority under FISA is an important intelligence-gathering tool in a small but significant subset of investigations. The authority is only available when the government provides the FISC with "specific facts" that the target may engage in activities that thwart the identification of communications service providers (such as rapidly switching mobile phone companies). See 50 U.S.C. § 1805(c)(2)(B). The authority is subject to FISA's touchstone evidentiary requirement: the government must demonstrate probable cause that the target is a foreign power or an agent of foreign power and that the target is using, or is about to use, a communications facility such as a telephone.

From 2001, when the roving surveillance authority was added to FISA, through 2010, the FISC has granted approximately [REDACTED] FBI requests to use this authority.

2. **Concerns**

Critics worry that this authority vests Agents with an inappropriate level of discretion and enables the FISC to issue surveillance orders that specify neither the person targeted nor the device to be monitored. They argue that FISA should be amended to require the order to identify either the device or individual being intercepted.

3. **Evaluation**

A roving intercept may be critical to effective national security surveillance. Agents have observed targets of FISA surveillance engage in counter-surveillance and instruct associates on

how to communicate through more secure means. In other cases, non-FISA investigative techniques have revealed counter-surveillance preparations (such as buying “throwaway” cell phones or multiple calling cards).

FISA requires the FBI to describe the target of roving surveillance with particularity and to report to the FISC within ten days (or more, if the Court permits) of using roving surveillance authority on a new communications device. The report must state, among other details: (1) the facts and circumstances supporting the FBI’s belief that the target was using the device; and (2) how the FBI will adapt standard minimization procedures to limit the acquisition, retention, and dissemination of communications involving U.S. persons that might be collected. 50 U.S.C. § 1805(c)(3).

We believe that this reporting requirement refutes the suggestion that the Title III ascertainment requirement should be imported into FISA. Adding a requirement that the government know that the target is proximate to the facility would effectively require the FBI to maintain constant physical surveillance of the target or risk missing communications it is otherwise entitled to intercept. That risk is substantial when dealing with surveillance-conscious targets. The reporting requirement guards against misuse of the authority. There have been no known major compliance issues with grants of roving surveillance authority.

We believe that the statutory safeguards provide for an appropriate balance between the FBI’s national security needs and privacy rights and civil liberties. We also believe that the justification for the roving surveillance authority offered to Congress in 2001 remains valid today. The technological advances of the past decade have only heightened its importance. The FBI is confronted with the increased availability of prepaid (throw-away) mobile phones; the ease of adding and/or porting telephone numbers; easily established email and messaging accounts; and other readily accessible means of electronic communications. As these widely-available and often-free technologies develop and diversify, the need for roving surveillance authority to help protect national security will continue to grow.

4. Recommendation

In light of the FISA legal threshold and judicial oversight of the exercise of the roving surveillance authority, we believe this essential tool for protecting national security should remain in effect. We believe that the judicial oversight required by FISA is sufficient to ensure that the authority is used as intended.

E. “Lone Wolf” Authority

1. Background

The FISA “lone wolf” authority applies only to non-U.S. persons who “engage[] in international terrorism or activities in preparation therefor.” See 50 U.S.C. §§ 1801(i) and 1801(b)(2)(C). The government must otherwise satisfy the requirements of FISA, including the requirement of certification that a significant purpose of the surveillance is to collect foreign intelligence information. In practice, this means that the government will likely know a great deal about the target, including the target’s purpose and plans for terrorist activity (in order to

satisfy the definition of “international terrorism”), but may not be able to connect the individual to a group that meets the FISA definition of a foreign power.

2. Concerns

Critics contend that, because terrorism is a crime, the government could obtain a Title III surveillance order from a criminal court if there is probable cause to believe that a lone individual is planning a terrorist act. They thus believe that there is no need for the authority. On the other hand, some non-FBI interviewees suggested that the statute should be expanded to include U.S. persons.

3. Evaluation

There are scenarios where this authority would provide the only avenue to effect surveillance of a foreign terrorist. A non-U.S. person could sever ties with a foreign terrorist group after an internal dispute, yet remain committed to international terrorism. In that event, absent this provision, the government may not be able to show probable cause to believe he is an agent of a foreign terrorist group and thus a permitted target of FISA surveillance. Without the “lone wolf” authority, the government could not initiate or could be forced to postpone FISA surveillance until the person could be linked to a foreign terrorist group – even though he posed a real and imminent threat. The “lone wolf” provision may also be needed to conduct surveillance of a non-U.S. person who “self-radicalizes” using inspiration, information, or training obtained on the Internet or through other means not connected to a foreign terrorist group. This non-U.S. person could adopt the aims and means of international terrorism without being a member of, or acting as an agent of, a terrorist group.

[REDACTED] The tool is thus essential for the rare situations in which investigators identify a non-U.S. person engaged in foreign terrorist activities, but cannot immediately connect that person to a foreign terrorist group. The narrow language of this provision minimizes the risk of overuse. To assure effective oversight, the FBI has committed to notify the appropriate Congressional committees if it invokes the authority. We believe that the authority should be preserved.

We do not believe, however, that the provision should be expanded to include U.S. persons. FBI counterterrorism personnel we interviewed saw no overriding operational reason for this change because Title III authority exists for electronic surveillance and physical searches of U.S. persons suspected of terrorist activities. Title III surveillance may not be as efficient and effective as FISA surveillance in counterterrorism investigations, but we believe that the use of Title III is a better balance of the competing interests when a U.S. person is involved. Moreover, because FISA’s primary purpose is to acquire foreign intelligence, the absence of an established foreign connection could raise serious legal issues if the target were a U.S. person engaged in criminal activities.

4. Recommendation

We believe that the “lone wolf” authority as enacted should remain in effect and that the judicial oversight required by FISA is sufficient to ensure that the authority is used as intended.

Additional Authorities

The Terms of Reference also asked Judge Webster to “review ... whether the FBI should propose any legislative action to improve its ability to deter and detect such threats [as those posed by Major Hasan] while still respecting privacy and civil liberty interests.”

We interviewed a broad range of FBI personnel involved in counterterrorism work at Headquarters and in the field; former FBI and other U.S. Intelligence Community personnel; and members of the Majority and Minority staff of the Congressional Judiciary and Intelligence Committees. Although we received a number of recommendations for legislative action, we identified two in particular that the FBI has proposed or could propose to improve its ability to deter and detect terrorist threats: amendments to the Communications Assistance for Law Enforcement Act (CALEA)(1994), 47 U.S.C. § 1001 *et seq.*, and definitive and consistent counterterrorism administrative subpoena authority. The FBI believes, and we agree, that amending CALEA is an immediate priority.

A. CALEA in the Twenty-First Century: “Going Dark”

1. Background

Our investigation revealed the adverse impact of evolving technologies on the FBI’s lawfully authorized ability to access, collect, and intercept real-time and stored communications. Since the passage of the CALEA in 1994, electronic communications technologies have evolved in diverse and dramatic ways. New and popular modes of electronic communications – text, voice, and video – exist and flourish outside the scope of CALEA, challenging the FBI’s practical ability to conduct timely and effective lawful electronic surveillance of communications by terrorists and other criminal threats to public safety and national security.

The FBI is confronted by the likelihood that any given subject of an assessment or investigation will have access to multiple communications devices, service providers, accounts, and access points. Nidal Hasan possessed or had access to a mobile telephone, a pager, four computers, three private email accounts with two service providers, five military email accounts, and access points ranging from his apartment to his workplace, as well as any merchant or municipality that provided a WiFi hotspot.

There is no known evidence that Hasan used any form of electronic communication other than website posts and email to attempt to contact Aulaqi (see Chapters 5 and 6). However, our investigation disclosed that Aulaqi [and others had] [REDACTED] exploited [electronic communications technology] [REDACTED] in an effort to conceal their identities, geographic locations, and operational activities. The same problem exists in criminal contexts, notably in child exploitation/pornography contexts and drug trafficking.

The use of advanced technologies by terrorists and criminals is worrisome because of the FBI's increasing inability to intercept communications using those technologies. When CALEA was enacted in 1994, a handful of large companies serviced most U.S. telephone users using relatively standard technologies. CALEA sought to maintain law enforcement's ability to conduct surveillance of communications services using traditional land line and cellular platforms. In 2005, the Federal Communications Commission (FCC) applied CALEA to "interconnected" VoIP services and providers of facilities-based broadband access services. At that time, there were nearly 40 million high-speed Internet lines serving U.S. residences and businesses, and at least one high-speed provider in 95% of U.S. zip codes. *See* FCC News Release, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (July 7, 2005).

CALEA does not apply, however, to other Internet-based or -enabled technologies, notably VoIP services that fall outside the FCC's definition of "interconnected" VoIP services (for example, one-way calling services, peer-to-peer communications services, and other voice communications services provided by Internet Service Providers). Although many U.S.-based service providers not subject to CALEA cooperate with the FBI, they are not required to have, and do not all have or maintain, the capability to enable prompt and effective surveillance of their communication services.

The FBI refers to the impact of the widening gap in its ability to conduct lawful electronic surveillance as "Going Dark." *E.g., Going Dark: Lawful Electronic Surveillance in the Face of New Technologies*, Hearing before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 112th Cong. (2011) (statement of then-FBI General Counsel Valerie Caproni). We believe that the FBI should pursue legislation that will bring communications assistance to the FBI and other law enforcement agencies into the Twenty-First Century.

The electronic communications revolution is global. An increasing number of enterprises have facilities outside the U.S. that provide services to persons in the U.S., which creates significant jurisdictional, logistical, and technical complexities for conducting lawful electronic surveillance on their facilities. Modernizing the scope of the requirement to have lawful intercept capabilities would not be effective unless the FBI also had access to off-shore enterprises that provide services inside the U.S. The FBI thus believes it is important to require communications service providers to U.S. persons to maintain an operational "point-of-presence" in the U.S. for the conduct of electronic surveillance.

2. Concerns

Any proposal to amend CALEA must consider the potential impact on the civil liberties and privacy interests of U.S. persons, as well as the compliance costs placed on private enterprise. *E.g., Going Dark: Lawful Electronic Surveillance in the Face of New Technologies*, Hearing before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 112th Cong. (2011) (Statement of Laura W. Murphy, Director, Washington Legislative Office, ACLU). The ACLU has expressed a primary concern about the potential for limitless reach inherent in any proposal to regulate electronic communications providers in an increasingly interconnected and Internet-reliant world. There is also concern that the costs of fulfilling CALEA's capability and capacity requirements will be passed through to consumers and could inhibit the development of new and

innovative technologies. For these reasons, the ACLU concludes that CALEA should not be extended to communications methods unless the FBI and other law enforcement agencies demonstrate an associated threat to the U.S.

These are important concerns. Congress enacted CALEA to assure that law enforcement obtains prompt and effective access to communications services when conducting a lawful electronic surveillance during the investigation of a threat. The statute is founded on the recognition that lawful electronic surveillance activities may be difficult, if not impossible, absent an existing level of capability and capacity on the part of communications service providers. New communications technologies do not pose a threat to the U.S. The threat to our national security – implicit in CALEA and increasingly explicit in FBI investigations – is the lack of surveillance capability and capacity on the part of service providers that use those new technologies. The FBI's proposed amendments would require those service providers to fulfill the same capability and capacity requirements that the telecommunications industry has fulfilled for nearly 20 years.

3. Recommendation

In view of the weighty impact of evolving technologies on FBI intelligence-gathering and counterterrorism operations, the FBI should pursue its proposed amendments to CALEA. In considering those proposals, Congress should weigh the FBI's operational needs and the specter of "going dark" with the potential effects on privacy rights and civil liberties.

B. Counterterrorism Administrative Subpoena Authority

1. Background

The FBI's counterterrorism authorities are not as robust as its law enforcement authorities. The FBI has the authority to issue administrative subpoenas in narcotics, child-abuse, and child-exploitation investigations, but not in counterterrorism investigations. Because counterterrorism is the government's highest national security priority, this inconsistency is noteworthy, although we recognize that counterterrorism investigations may implicate potential risks to civil liberties and privacy interests in ways that traditional law enforcement investigations do not.

Proposals have been advanced to authorize the FBI to issue administrative subpoenas to compel the production of records and documents in aid of terrorism investigations. Some proposals would also authorize the FBI to compel testimony. Others would replace the NSL statutes with administrative subpoena authority in order to simplify and streamline the law.^{22/}

One notable proposal we received would authorize the FBI to secure third-party records – but not testimony – modeled on 21 U.S.C. § 876, which authorizes DOJ agencies to issue subpoenas for records relevant to narcotics investigations. The proposal would apply only in terrorism investigations, not in other national security investigations. It would not be available to obtain those sensitive records identified in FISA Section 215 (library circulation records and patron lists, book sales records, book customer lists, firearms sales records, tax return records, and educational records and medical records containing information that would identify a person). Agents seeking those records would have to use Section 215. Finally, the proposal would adopt Section 215 and NSL safeguards, including the internal approval requirements and the mechanisms for challenging the subpoena and any non-disclosure order.

Proponents of FBI counterterrorism administrative subpoena authority, including Special Agents we interviewed in the field, believe that time is often of the essence in terrorism investigations, and the FBI should have the ability lawfully to compel third parties to provide

^{22/} For example, in April 2008, David Kris, former Assistant Attorney General, DOJ National Security Division, but at that time a private citizen, proposed legislation in testimony before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Committee on the Judiciary that would enact “a single statute, providing for national security subpoenas, to replace all of the current NSL provisions.” *National Security Letters Reform Act of 2007: Hearing on H.R. 3189 Before the H. Subcomm. on the Constitution, Civil Rights and Civil Liberties*, 110th Cong. (2008) (statement of David Kris), at 1. Mr. Kris stated that any new statute should satisfy ten essential elements described in his written submission – most notably, that national security subpoenas should be (1) issued by DOJ lawyers; (2) limited to acquiring specified types of foreign intelligence or other protective information; and (3) governed by rigorous minimization procedures concerning acquisition, retention, and dissemination of information. *Id.* at 2; *see also* Christophir Kerr, *What the Real Jack Bauers Really Need: A New Subpoena*, 1 William & Mary Policy Rev. 51 (2010), in which a former FBI Agent, proposes national security subpoena authority for the FBI similar to grand jury and other administrative subpoenas, with high-level approval required for subpoenas of organizations engaged in First Amendment political advocacy and with independent judicial review.

information as quickly as possible. It is not difficult to imagine an urgent scenario in which obtaining a grand jury subpoena for documents from a federal prosecutor is not practicable. Assume, for example, that Top Secret, compartmentalized information suggests that the FBI should obtain certain records from a chemical supply company. To obtain a grand jury subpoena for those records, the Agent would need to describe the underlying information to allow the AUSA to determine whether the records are relevant. That would require access to an AUSA with a Top Secret security clearance who has been “read in” to the relevant compartment. At night and on weekends, even if such an AUSA was available, establishing a secure method of communication could be difficult, if not logistically impossible. Moreover, there is no general legal requirement that recipients of grand jury subpoenas keep them secret, further complicating reliance on the grand jury as a method of compelling production of documents. See also Testimony of Rachel Brand, Principal Dep. Asst. Attorney General, Office of Legal Policy, before the Subcomm. on Terrorism, Technology and Homeland Security of the Senate Judiciary Comm. (June 22, 2004), at 6-7.

Proponents also say that the varying procedural and substantive standards in the NSL statutes create practical difficulties in the field. The OIG 2008 NSL report revealed, for example, that FBI agents did not always appreciate the difference between NSLs under 15 U.S.C. §§ 1681u and 1681v of the Fair Credit Reporting Act. The result was that agents were sometimes slow to use the NSLs and sometimes used them incorrectly – to the potential detriment of both national security and civil liberties.

Proponents acknowledge that the FBI mishandled its expanded NSL authorities in the wake of 9/11 – as described in the DOJ Inspector General’s 2007 report – but argue that these problems were resolved by the expansion of FBI and National Security Division oversight and the implementation of an effective NSL subsystem to ensure that all statutory and regulatory requirements are satisfied before an NSL may be issued. These same measures, proponents say, would apply to any broader administrative subpoena authority and prevent that new authority from succumbing to the problems revealed by the Inspector General’s report.

2. Concerns

Opponents argue that administrative subpoena authority in terrorism cases would fundamentally change the traditional limits on law enforcement interference with privacy rights and civil liberties. They cite important checks and balances on the government’s authority to compel the production of documents and express concern that administrative subpoenas would compel U.S. citizens to produce documents, potentially in secret on certification by the Attorney General, without the participation or protection of a U.S. Attorney, grand jury, or judge. No showing of reasonable suspicion, probable cause, or even imminent need or exigent circumstances would be required. That is true, however, about administrative subpoenas in any context, as issued by any number of other federal departments and agencies.

Opponents recognize that the swift production of documents can be critical to the FBI’s ability to prevent terrorist acts. They note, however, that the administrative subpoena proposals do not require an imminent threat of harm. They suggest alternative ways to obtain the immediate production of documents: amending FISA to provide for emergency Section 215 orders; posting “duty” AUSAs to be available around the clock for issuing grand jury subpoenas;

and/or limiting administrative subpoena authority to exigent circumstances as certified by the FBI Director (similar to the Secret Service Director's authority to issue administrative subpoenas under 18 U.S.C. § 3486(a)(1)(A)(ii) in the event of an imminent threat of harm to a protectee). They also note that secrecy can be achieved by providing for non-disclosure of counterterrorism grand jury subpoenas upon certification of need.

At hearings held by the Subcommittee on Terrorism, Technology and Homeland Security of the Senate Judiciary Committee in 2004, the principal justifications advanced by DOJ and other witnesses (as well as Senators) for administrative subpoena authority were the need for speed and the risk that an AUSA would not be available. However, in a response to a written question from Senator Patrick Leahy in January 2005, DOJ stated that it was "unaware of any specific instances in which an AUSA's inability to sign off on an emergency grand jury subpoena resulted in a loss of evidence or some other irrevocable consequences [to] a pending investigation." A Review of the Tools to Fight Terrorism Act: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary, 108th Cong., 2d Sess. (2004), at 38. Proponents argue, nonetheless, that the absence of this tool naturally slows or disrupts investigations. When a terrorism investigation must resort to a more cumbersome or time-consuming tool because the NSL statutes do not reach the needed information, real or potential terrorists might gain an advantage.

3. Recommendation

Given the FBI's view that administrative subpoena authority for terrorism investigations would be useful in potentially critical situations and in resolving the complexities of the NSL statutes, the FBI could seek a definitive and consistent administrative subpoena authority that is compatible with its counterterrorism mission. If this authority is sought, then Congress should weigh the FBI's operational needs against the potential effects on privacy rights and civil liberties. We recommend consideration of the following salient issues:

- Consistency: Should the FBI have the authority to issue administrative subpoenas in narcotics and child pornography investigations, but not in terrorism investigations?
- Need: Have the proponents of counterterrorism administrative subpoena authority justified its operational need or usefulness? Although the government has not cited instances when the lack of this authority resulted in lost evidence or harm, other justifications (such as the elimination of confusion and complexity) exist. Are there alternative authorities that would meet the government's needs (such as emergency Section 215 orders or Director certified subpoenas in exigent circumstances)?
- Availability and Scope: Should, as suggested by some non-FBI commenters, the use of the subpoenas be available in assessments, or should they be available only in predicated investigations? Should the subpoenas reach all records, or should Section 215 "sensitive" documents be excluded? Should the subpoenas compel testimony as well as documents and records?

- **Issuer:** Should the FBI have the authority to issue the subpoenas (as it does with NSLs and other administrative subpoenas) or should a DOJ attorney (for example, an AUSA) issue them as is done with grand jury subpoenas?
- **Standard:** Should the subpoenas issue based on “relevance to an authorized investigation” or a standard that requires a closer nexus to and/or predicate for the investigation?
- **Non-Disclosure/Secrecy:** Should the non-disclosure and judicial review provisions of the NSL statutes (as modified to reflect Doe v. Mukasey) govern the subpoenas?
- **Minimization:** What minimization procedures, if any, should apply to the acquisition, retention, and dissemination of records acquired by the subpoenas?
- **Reports/Audits:** Should counterterrorism administrative subpoena authority include required reporting to Congress, OIG and National Security Division audits, and/or FBI OIC compliance reviews and Inspection Division audits?

Congress is responsible for assessing these issues and determining whether to grant the FBI administrative subpoena authority for terrorism investigations. We offer the following thoughts.

First, whether or not subpoena authority is granted, the varied standards of the NSL statutes should be reconciled and made consistent.

Second, if the authority is granted, the FBI should adopt and implement strict document access and control protocols to ensure that acquired information that lacks current investigative value is not improperly accessed, retained, or disseminated. Those protocols would be comparable to those the FBI is implementing to limit dissemination of certain NSL information or to the restricted access that is provided for grand jury material.

Third, any counterterrorism administrative subpoena authority should be subject to oversight by Congress, OIG, and NSD. Initially, this should include periodic reports to Congress as experience indicates and annual OIG/NSD audits. The FBI’s OIC should be tasked with lead responsibility for identifying potential compliance risks, devise and monitor measures to mitigate those risks, and coordinate with the FBI Inspection Division to conduct compliance reviews and audits. The FBI should also expand the NSL subsystem to include any subpoena authority to ensure that the appropriate authority is invoked, that all required approvals (including legal review) are obtained, and that the relevant investigative file has been opened in accordance with the AG Guidelines.

A 2008 Inspection Division review of the FBI’s use of existing administrative subpoena authorities found that the process for obtaining these subpoenas allowed Agents to use them for investigations not authorized by statute in five percent of sampled cases. (The overall non-compliance rate was higher for all compliance issues, including administrative errors such as missing or incorrect citations.) The review also found that the FBI lacked a standardized mechanism to track the number of administrative subpoenas issued. To mitigate non-compliance

risks, ICP developed a plan to automate the process for issuing administrative subpoenas. A March 2011 Inspection Division audit found, however, that compliance concerns remained, and recommended further mitigation of compliance risks. The ICP has developed a corrective action plan. The FBI should ensure that any steps taken under that plan would apply to any counterterrorism administrative subpoena authority.

Part Five

Recommendations

The Terms of Reference asked Judge Webster to assess “whether there are other policy or procedural steps the FBI should consider to improve its ability to detect and deter ... threats such as that posed by Major Hasan ... while still respecting privacy and civil-liberty interests” and “whether any administrative action should be taken against any employee.”

We make eighteen recommendations for policy, procedural, and other actions to be taken by the FBI and/or the Attorney General. We then discuss the conclusions of our careful deliberations about whether administrative action should be taken against any employee.

We recognize that the FBI has continued to evolve as an intelligence and law enforcement agency in the aftermath of the Fort Hood shootings and in furtherance of internal and external recommendations that followed, including the Special Report of the Senate Committee on Homeland Security and Governmental Affairs (February 3, 2011). To the extent our Recommendations may parallel or implicate actions and initiatives proposed internally or by others, they should not be read to suggest that the FBI has not been diligent in pursuing those actions and initiatives, but to underscore their importance. We understand, for example, that the FBI has drafted written policies that would fulfill our Recommendations A.1, A.6, and A.7 below. We urge the FBI to finalize and promulgate these policies.

A. POLICIES

RECOMMENDATION A.1:

A Formal Policy on Counterterrorism Command-and-Control Hierarchy

The FBI should prepare and promulgate a written policy that identifies the division of authority and the command-and-control hierarchy among the FBI's Headquarters entities (including the Counterterrorism Division, NJTTF, and the Directorate of Intelligence) and its field entities (including Field Offices and JTTFs). The policy should provide a clear understanding of each entity's responsibility, authority, and accountability within the FBI and in interactions with other governmental departments and agencies.

RECOMMENDATION A.2:

A Formal Policy on the Ownership of Counterterrorism Leads

The FBI should prepare and promulgate a written policy establishing ownership and ultimate responsibility when one Field Office or JTTF sets a counterterrorism lead to another Field Office or JTTF. This policy should adopt current FBI practice that the receiving office has ultimate responsibility for resolving leads set by other Field Offices or JTTFs. This policy should also discuss procedures for resolving disagreements between Field Offices, JTTFs, and other FBI entities.

The FBI should also consider applying this policy to national security, criminal, and other investigative contexts.

RECOMMENDATION A.3:**A Formal Policy on Elevated Review of Interoffice Disagreements in Counterterrorism Contexts**

The FBI should prepare and promulgate, either alone or in the context of Recommendations A.1 and A.2, written policy identifying the procedures for resolving inter-office disagreements in counterterrorism contexts, whether about the adequacy of a response to a lead or any other subject. We recommend that the FBI adopt the existing informal process of elevating disagreements up the chain-of-command within Field Offices and JTTFs (Special Agent-Supervisory Special Agent-Assistant Special Agent in Charge-Special Agent in Charge). We recommend that the policy identify when and how to contact FBI Headquarters; who should be contacted at FBI Headquarters; and who should become involved in the resolution of disagreements. We also recommend that the FBI train all personnel on the elevation of interoffice disagreements.

The FBI should also consider applying this policy to national security, criminal, and other investigative contexts.

RECOMMENDATION A.4:**A Formal Policy on the Assignment and Completion of Routine Counterterrorism Leads**

The FBI should prepare and promulgate a written policy for prioritizing Routine counterterrorism leads set outside of the Guardian system. This policy should adopt reasonable deadlines for the assignment of Routine leads and for responses to these leads. As our investigation revealed, formal deadlines will assure that supervisors and assignees read and handle leads in a timely manner. Nearly fifty days passed before the supervisor read and assigned the Hasan lead. Another ninety days passed before the assignee read and took action on the lead.

Our investigation also revealed, however, that mere adherence to deadlines is not necessarily consistent with effectiveness. By allowing the assignee to wait until the ninetieth day – the deadline for response under informal FBI practice – to read and take action on the lead, WFO denied itself the time to conduct a thoughtful and adequate assessment. Expediting assessments and preliminary investigations by imposing tight deadlines would likewise risk denying the Agent, Analyst, or Task Force Officer time to provide a thoughtful and complete response. We are also concerned about the imposition of unreasonable deadlines on personnel who are already working heavy caseloads with varied and constant demands on their time.

The FBI's published Guardian Policy and System Guidelines, which apply to Type 1 and 2 assessments, require supervisors to ensure that Routine incidents are assigned within five business days and state that "[e]very attempt must be made to 'mitigate' Guardian incidents within the first 30 days." [REDACTED] [FBI policy number

redacted]. The 30-day period can be extended if the supervisor provides a documented justification. Compliance with these deadlines is monitored and audited by a Headquarters unit, the Assessment Review Team.

We recommend that the FBI policy on prioritizing Routine non-Guardian leads in counterterrorism contexts should (1) require the receiving supervisor to assign the lead within, at minimum, two weeks of receipt; (2) adopt the existing informal practice that work on a lead must be completed within 90 days of assignment (unless the supervisor imposes a shorter deadline); and (3) provide for Headquarters-level monitoring and audits of compliance with these deadlines through the ITOS unit responsible for program management of the relevant Field Office or JTTF. The policy should provide for an extension of the 90-day deadline if the assignee provides written evidence to his or her supervisor that circumstances such as the exceptional demands of the lead or workload render it unreasonable to complete the work within 90 days. We also expect the FBI to establish and enforce robust management and monitoring procedures to assure that inexcusable delays of the type that occurred in the Hasan matter do not recur.

RECOMMENDATION A.5:

A Formal Policy on Counterterrorism Leads Assigned to JTTF Task Force Officers

The FBI should prepare and promulgate a written policy that no JTTF Task Force Officer will be assigned lead responsibility for an assessment or investigation of an employee of his or her home department, agency, or authority. We encourage reliance on Task Force Officers as consultants in these contexts; but the FBI is ultimately responsible for the activities of its JTTFs, and its Special Agents are best prepared and best qualified to conduct counterterrorism investigations – as citizens, we want the FBI to investigate in these contexts. As a result, FBI Special Agents should take lead responsibility for conducting any assessment or investigation of an employee of a department, agency, or authority that has provided a Task Force Officer to the relevant JTTF.

RECOMMENDATION A.6:

A Formal Policy on the FBI Clearinghouse Process for Counterterrorism Assessments and Investigations of Law Enforcement Personnel

Although the military context of the Fort Hood shootings has focused attention on information-sharing and other measures involving the Department of Defense, we believe that equal, if not potentially greater, national security risks could arise in other contexts involving government employees with ready access to weapons and intelligence. We recommend that the FBI finalize and promulgate a written policy requiring Field Offices and JTTFs to notify the Counterterrorism Division – which will, in turn, advise the NJTTF – of any counterterrorism assessment or investigation of a known member of a federal, state, local, or tribal law enforcement agency. Under this policy, the NJTTF's Homeland Security component should track these assessments and investigations, while the Counterterrorism Division should determine whether the subject's agency can and should be notified of the

assessment/investigation or its predication. Any disclosure would comply with FISA minimization procedures. This policy would parallel the FBI-DoD clearinghouse procedure in assuring that Field Offices and JTTFs provide timely and consistent notice of counterterrorism assessments and investigations of law enforcement personnel to the NJTTF and, if appropriate, to the law enforcement agency involved.

RECOMMENDATION A.7:

A Formal Policy on the FBI Clearinghouse Process for Counterterrorism Assessments and Investigations of Other Government Personnel

We do not believe that the FBI-DoD clearinghouse procedure and the policy proposed by Recommendation A.6 are sufficient to resolve the information-sharing risks implicated by the Hasan matter. We recommend that the FBI identify other federal departments and agencies outside military and law enforcement contexts (for example, the Department of State and the Transportation Security Administration) as subjects of comparable information-sharing procedures. We recommend that the FBI then finalize and promulgate a written policy requiring Field Offices and JTTFs to inform the Counterterrorism Division and the NJTTF of counterterrorism assessments and investigations involving employees of those departments and agencies. This policy should place responsibility on the Counterterrorism Division to determine whether to disclose the assessment or investigation to the relevant department or agency. Any disclosure should comply with FISA minimization procedures.

B. OPERATIONS

RECOMMENDATION B.1:

Continued Integration of Intelligence Analysts into Operations

Throughout our investigation, we were impressed by the quality and commitment of the FBI's Intelligence Analysts – and by the increasingly effective integration of those Intelligence Analysts into the FBI's hierarchy and culture. The FBI has made notable progress in embedding Intelligence Analysts in the Counterterrorism Division and the Counterterrorism Analysis Section in operational squads, in implementing counterterrorism “fusion cells,” and in pursuing initiatives to apply the “fusion cell” model across its operational divisions. We recommend that the FBI continue to increase the number and participation of Intelligence Analysts in its operational divisions.

C. INFORMATION TECHNOLOGY AND REVIEW

Our investigation witnessed, first-hand, the impact of the ever-increasing diversity and complexity of communications technologies and services – and the ever-expanding amount of electronically stored information – on the FBI's electronic surveillance and information review and management capabilities. The FBI and other law enforcement agencies need the financial

resources, capability mandates, and human and technological capacity to respond to these complex and sensitive issues.

The ability to conduct effective electronic surveillance in the face of evolving technologies and massive accumulations of data represents only half of the challenge. The ability to acquire and collect information is meaningless unless the FBI has the technology, the human resources, and the protocols to review, analyze, relate, manage, and act on that information in a timely and effective manner. On January 7, 2010, two months after the Fort Hood shootings, the President issued a directive to the U.S. Intelligence Community to “[a]ccelerate information technology enhancements, to include knowledge discovery, database integration, cross-database searches, and the ability to correlate biographic information with terrorism-related intelligence.” We concur fully with that directive.

Our Technology Recommendations have financial implications in a time of budgetary constraints. To the extent these Recommendations would require the FBI to divert funding from projects of equal or greater importance or from system maintenance, we urge the FBI to seek additional funding for what we believe to be crucial technology needs.

RECOMMENDATION C.1:

Expedite Enterprise Data Management Projects

The historical evolution of the [multiple] FBI [REDACTED] [and other U.S. Intelligence Community (USIC)] databases as discrete platforms has impeded the FBI [and USIC’s] ability to access, search, organize, and manage electronically stored information [in an efficient manner].

[REDACTED]

[REDACTED]

Because information is the FBI’s essential tool as an intelligence and law enforcement agency, we recommend that the FBI expedite and, if appropriate, seek expanded funding for Enterprise Data Management projects, with an initial emphasis on aggregation of its primary investigative databases, the collection and storage of data as a service separate from applications, and the development of shared storage solutions across USIC members.

Enterprise Data Management is the process of normalizing, consolidating, integrating, and federating information technology platforms, systems, and data to increase consistency and efficiency in storage, search, management and, when possible, sharing of data holdings. In the ideal, Enterprise Data Management projects would resolve FBI databases into a handful, at most, of access-controlled databases that could be reviewed using common search and management

tools while also pursuing access-controlled interagency solutions to the collection and sharing of information without copying across agencies. In most public and private enterprises, budget considerations require Enterprise Data Management to occur only as and when specific platforms and systems are replaced or removed from service. Because data is now the FBI's primary business, Enterprise Data Management cannot wait, and should be addressed immediately as an essential priority.

RECOMMENDATION C.2:

Expand and Enhance the Data Integration and Visualization System

In January 2010, as a first step in responding to the President's directive on information technology enhancements, Director Mueller tasked the Special Technologies & Applications Section (STAS) with developing a means of searching across the FBI's primary repositories of data. The result, deployed in October 2010, is the Data Integration and Visualization System (DIVS).

DIVS provides a one-password, access-controlled, integrated search capability that allows Agents, Analysts, TFOs, Linguists, Language Support Specialists, and Staff Operations Specialists to conduct searches across FBI data stores that otherwise do not and cannot connect with each other. Its Google-like interface returns results from each database that the user is authorized to access (and reports any results that exist on databases the user does not have authority to access).

At this writing, DIVS provides users with the ability to search across [REDACTED] [more than fifty FBI and non-FBI] databases [REDACTED]

[REDACTED] STAS plans to [REDACTED] expand the reach of DIVS to other [FBI and] U.S. Intelligence Community, law enforcement, and public data sets.

Although DIVS is a visually appealing and impressive search tool, it is a short-term and somewhat superficial solution to the FBI's proliferation of databases. It is crucial that FBI management understand that DIVS, in its existing design, is only an indexing and search tool. DIVS does not aggregate or convert data; instead, it creates and searches a massive index of the content of the included databases. When the user selects a return for review, DIVS opens that file in its native database application; thus, for example, if a search returns a result from DWS-EDMS, a click on that result will take the user to that item in DWS-EDMS. The user then conducts review and further searches of that item in DWS-EDMS.

DIVS does not and cannot normalize and consolidate the FBI's balkanized data stores or otherwise provide true interconnectivity of databases. Its search capabilities are welcome, but

should not be interpreted as anything but a bridge to the essential solution of an Enterprise Data Aggregation Plan.

RECOMMENDATION C.3:

Acquire Modern and Expanded Hardware for DWS-EDMS

The limited functionality of DIVS also underscores the importance of the individual systems that house the FBI's primary databases and the need to assure that those systems are robust, reliable, and sustainable. DIVS is only as good as the databases it indexes and searches. The addition of its cross-database search capability should not cause the FBI to lose focus on DWS-EDMS, whose functionality cannot be replicated or replaced by DIVS.

Although originally designed by the Special Technologies & Applications Section (STAS) as a transactional warehouse, DWS-EDMS has evolved, through STAS's expertise, into one of the FBI's workhorse systems. [REDACTED]

The [September] 2011 [REDACTED] enhancement provided a more intuitive user experience, automation of tasks, and a significant increase in reviewer efficiency and accuracy.

When our investigation began, some hardware components of DWS-EDMS were eight years old and stressed. During the course of our investigation, STAS migrated DWS-EDMS to a new generation of hardware. The design of the new DWS-EDMS system permits the addition of equipment as needed, thus allowing STAS to maintain system performance at an acceptable operational standard.

Our investigation also disclosed that DWS-EDMS is operating without a "live" disaster recovery backup system. [REDACTED]

[REDACTED] We believe Congress should provide the FBI with funding for additional system investments.

We recommend that the FBI seek funding for the immediate acquisition of new hardware for DWS-EDMS by no later than 2012. This hardware, which would house the database, website, and search and analysis software, as well as integration and development tools, will significantly enhance search, analysis, management, and authorized data mining functions. This upgrade should fulfill the likely data capacity requirements for DWS-EDMS through 2018. It would require no software development, but simply the acquisition of the following or similar hardware, which we identify as a matter of example only – the FBI will need to assess, validate, and update any potential system depending on its needs, and broader Intelligence Community initiatives, at

the time of implementation. The important point is that the FBI needs to pursue a system solution for the horizontal scaling of data. Based on technology existing at the time of our investigation, the following is an example of the hardware needs of DWS-EDMS in its current architecture:

Production System:

[Redacted]

Integration/Development System:

[Redacted]

[The redacted portions involve details of sensitive FBI information system capabilities and requirements.]

The Integration/Development System will also provide the FBI with an essential “live” or “failover” disaster recovery backup, although it would operate at a significantly reduced response rate, slowing searches and other activities. Given the crucial role that DWS-EDMS plays in counterterrorism and law enforcement activities, the optimum disaster recovery system would include a co-located duplicate of the Production System, enabling immediate replacement of the Production System in the event of disaster without any impact on system performance. We recommend that the FBI carefully assess the risks associated with operating only with the Integration/Development System as a disaster recovery backup and consider seeking funding from Congress for acquisition of a duplicate of the Production System for disaster recovery purposes – to continue with the example provided above, based on existing technology and architecture.

Optional “Live” Disaster Recovery Backup System:

[Redacted]

[The redacted portion involves details of sensitive FBI information system capabilities and requirements.]

RECOMMENDATION C.4:

Acquire Advanced Information Search, Filtering, Retrieval, and Management Technologies

We recommend that the FBI evaluate and, if appropriate, acquire and implement advanced and automated search, filtering, retrieval, and management technologies to assist Agents, Analysts, TFOs, and other personnel in reviewing and managing data – particularly the contents of Strategic Collections [REDACTED]. These tools are an important means by which the FBI can hope to master the ever-expanding amount of electronic data in its possession.

Advanced search tools transcend the simplistic keyword searching and filtering available on most FBI databases by revealing communication patterns, compiling threads of electronic conversations, identifying near-duplicate documents, and performing other functions to narrow large data sets and focus review time on materials of potential significance. The most advanced search tool is “concept search” – sometimes called “analytics” – which dramatically enhances the volume, speed, and accuracy of human review.

Concept search tools use computational analysis of electronic information rather than keywords to produce their results. With keywords, the reviewer seeks out words that messages happen to share. Concept search tools, on the other hand, automatically analyze the language in electronic documents and link messages that contain the same or similar meanings. For example, a keyword search for “newspaper reporters” will return only messages that contain those words, while a concept search would identify and relate a message about newspaper reporters to a message about journalism even though the second message did not contain the words “newspaper” or “reporter.” If the user identifies a few key documents at the outset, he or she can find and follow a path of related documents, including emails written by the same person using two different accounts.

Concept search tools are comparable to one of the FBI’s standard tools, the Integrated Automated Fingerprint Identification System (IAFIS) (*see* C. Ball, *Clinching the Concept of Concept Search*, 2010). IAFIS, which is being replaced incrementally by the biometric Next Generation Identification System, compares a fingerprint found in the field to a database of more than 68 million known fingerprints. The system does not compare every aspect of a submitted print; instead, computer algorithms and/or fingerprint experts mark minute points, cores, and deltas as detected. The system compares the resulting digital geometric analysis of the ridges and bifurcations to its database of the geometric characteristics of known fingerprints. The system then returns a candidate list of potential matches.

IAFIS allows the FBI to narrow dramatically the universe of potential matches without considering every nuance of a fingerprint. To determine a true match, however, a human assesses the returns and decides whether the print is a match. IAFIS does not eliminate the need for human judgment, but assures a more efficient and effective use of FBI resources.

Applying a similar technique to email and other electronic documents, FBI personnel can use digital technology to analyze and compare texts instead of fingerprints. Imagine an alternative scenario in which Hasan used three different email accounts to communicate with Aulagi without always using his name. A keyword search of DWS-EDMS using Hasan's name or one of the email addresses would not return all of the messages. A concept search based on the email messages from one account, however, would identify messages with similar characteristics and group them with a predicted percentage of similarity. Just as focusing on geometrically similar fingerprints speeds the matching of fingerprints, concept searching speeds human review of electronic documents and produces results that would not be possible using keyword searches.

Enabling a reviewer rapidly to relate and group similar documents reduces the risk of overlooking messages or mistakenly marking messages. Agents, Analysts, and TFOs would no longer assess [redacted] [communications] day-by-day, [redacted] [item-by-item,] but in the context of the entire [redacted] [collection] or of the many databases indexed by DIVS.

Technology-driven law firms and corporations have tested and implemented concept searching in civil and criminal cases. In one study, a team of six professional reviewers competed against a concept search engine in assessing the relevance of electronic documents to three issues. The human reviewers identified 51% of the relevant documents, with a low of 43% for one issue. The concept search engine identified more than 95% of the relevant documents, with a high of 98.8% for one issue. See Electronic Discovery Institute, 2009. In a 2009 test by Verizon, a concept search engine automatically identified responsive documents with an accuracy rate of 92%.

The FBI has implemented automated processes in the wake of the Fort Hood shootings [redacted]

[redacted] The FBI has also introduced automated [tools] to prioritize messages for review [redacted]

[redacted] Concept search tools, on the other hand, allow for far more accurate and efficient processes that would prioritize messages not only by [redacted] specified terms, but also by the content of messages and the relationship of that content to other messages and email addresses.

Concept search technology cannot and should not displace human review of DWS-EDMS and other FBI data stores; but it is an essential and inevitable tool. The FBI should place high priority on adopting and deploying this technology. We understand that the FBI recently completed a market survey of advanced analytic tools and has acquired analytic, collaboration, and knowledge management software.

RECOMMENDATION C.5:**Adopt Managed Information Review Protocols for Strategic Collections [REDACTED] and Other Large-Scale [Data Collections] [REDACTED]**

We recommend that the FBI adopt and implement managed information review protocols for Strategic Collections [REDACTED] and other large-scale [REDACTED] [data collections]. These protocols should include:

- (1) **Training:** Comprehensive, hands-on training on DWS-EDMS and, if appropriate, the target and the subject matter of the investigation.
- (2) **Project Management:** A clear delineation of the roles and responsibilities of project managers and reviewers.
- (3) **Planning:** A review plan tailored to the needs of the specific case.
- (4) **Mission-Specific Review Teams:**
 A case-specific review team assigned primary responsibility for (a) gathering investigative and operational intelligence; (b) [REDACTED] [REDACTED] [reviewing and identifying information per FBI procedures]; (c) setting leads; (d) issuing case-specific Intelligence Information Reports; and (e) case development.
 An analytical review team assigned primary responsibility for (a) gathering and assessing strategic intelligence; (b) analyzing that intelligence in the context of regional and other strategic intelligence; and (c) issuing strategic Intelligence Information Reports.
- (5) **Workflow:** A well-designed procedure that encourages thoughtful, retrospective analysis of data as well as day-to-day reviewing and [REDACTED] [identifying] of products.
- (6) **Quality Control:** A well-designed series of quality control measures that allow program management or the analytical review team to sample and test case-specific reviewer accuracy in [REDACTED] [identifying] and relating products – and to identify products requiring further review.

D. GOVERNING AUTHORITIES

RECOMMENDATION D.1:

Increase Office of Integrity and Compliance (OIC) and Inspection Division Compliance Reviews and Audits

We recommend that OIC and the Inspection Division conduct compliance reviews and audits on a regular basis as experience indicates is necessary to ensure FBI compliance with all policies applicable to assessments and all policies and procedures that guard against the inappropriate use of First Amendment activity or race, ethnicity, national origin, or religion as a basis for investigative activity and to identify any concern about or impact on privacy rights and civil liberties. The FBI – and, if necessary, Congress – should make available sufficient personnel and funds to ensure that effective compliance monitoring is achieved.

These audits and reviews should examine:

- The FBI's use of assessments and the investigative techniques authorized for use in assessments (at least annually for a period of three years).
- The FBI's collection, mapping, and other use of racial/ethnic demographics and behavioral characteristics.
- The efficacy of the Guardian Management Unit and the Assessment Review Team in ensuring that the FBI follows all DIOG and other policies, including those concerning the opening of assessments, the use of investigative techniques during assessments, and the retention of information collected during assessments in Guardian and other FBI databases.
- The FBI's use of undisclosed participation in counterterrorism investigations involving religious and other First Amendment organizations and self-radicalizing individuals.
- The FBI's use of undercover operations and activities, including the use of confidential human sources and undercover FBI employees, in counterterrorism investigations.
- The FBI's use of its National Security Letter, Section 215 Business Records, and pen register/trap-and-trace authority, and the efficacy of the FBI's NSL Procedures.
- The FBI's use of additional investigative techniques approved by DIOG 2.0.

Although we conclude that the AG Guidelines standard for opening an assessment and the available investigative techniques strike an appropriate balance, privacy rights and civil liberties may be implicated. The recommended compliance reviews should ensure that this balance holds and identify any concern about or impact on privacy rights or civil liberties. The guiding principle should be that, as the risk of potential infringement of individual privacy rights

and civil liberties increases, the level of factual predication, supervisory approval, and oversight should increase. The FBI should modify or abandon policies and protocols that experience proves to be unacceptably harmful to privacy rights or civil liberties.

RECOMMENDATION D.2:

Assure Strict Adherence to Policies That Ensure Security for Information That Lacks Current Investigative Value

The FBI should strictly adhere to existing policies to ensure that personnel are not accessing or viewing information that lacks current investigative value unless there is a legitimate law enforcement or intelligence reason, and that personnel observe the Privacy Act in retaining information concerning First Amendment activities.

The FBI should apply these policies with particular focus – and OIC monitoring – to information gathered during assessments that implicates privacy interests, civil liberties, or First Amendment or other Constitutional rights. This focus would supplement existing FBI policy that requires any investigative activity – including activity involving assemblies or associations of U.S. persons exercising their First Amendment rights – to have an authorized purpose under the AG Guidelines that is rationally related to the information sought and the technique to be employed.

RECOMMENDATION D.3:

The FBI's National Security Letter, Section 215 Business Record, Roving Wiretap, and "Lone Wolf" Authorities Should Remain in Effect

Based on the FBI's operational experience, we believe that the FBI's National Security Letter, Section 215 Business Record, Roving Wiretap, and "Lone Wolf" authorities are essential tools for protecting national security. The safeguards built into each authority, including minimization standards and judicial oversight, minimize risks to civil liberties and privacy interests. As noted in Recommendation D.1, OIC and Inspection Division review and audits of the FBI's use of NSL and Section 215 authorities will help ensure that balance is maintained between national security needs and privacy rights and civil liberties.

RECOMMENDATION D.4:

Update Attorney General Guidelines Affecting Extra-Territorial Operations

The Attorney General's Guidelines for Domestic Operations did not supersede those sections of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSIG) and the Attorney General's Guidelines for Extraterritorial FBI Operations that govern FBI activities in foreign territories. The NSIG has

not been updated since 2003. The Guidelines for Extraterritorial FBI Operations, which govern non-national security matters, have not been updated since 1993. Given the FBI's heightened intelligence requirements in combating terrorism and the need for clear guidance on operational matters, the FBI should continued to work with the Attorney General to update and, if possible, consolidate these guidelines with other Attorney General Guidelines.

E. TRAINING

RECOMMENDATION E.1:

Train Task Force Officers on FBI Databases Before They Join Joint Terrorism Task Forces

Under current FBI practice, new Joint Terrorism Task Force Officers must receive training on FBI databases relevant to their tasks within six months of obtaining access to FBI systems. As the Hasan matter underscores, TFO knowledge of and ability to use FBI databases can be crucial to an assessment or investigation. No TFO should be permitted to join a JTTF unless and until he or she has had adequate training on the FBI's primary investigative databases, including DWS-EDMS, DaLAS, Clearwater, and IDW, as well as the Automated Case System (ACS). We recommend that database training become a mandatory component of the TFO Orientation & Operations Course (JTOOC) at Quantico.

We recognize, however, that mandatory training requirements could create practical issues given the known complexities and delays in interagency transitions and security clearances. We thus recommend that the FBI require all Task Force Officers to complete basic JTTF training within sixty (60) days of joining a JTTF and that the FBI assure that Task Force Officers who have not completed basic JTTF training are not assigned leads or otherwise assigned primary responsibility for any investigative action.

F. ADMINISTRATIVE AND DISCIPLINARY ACTION

RECOMMENDATION F.1:

As the Terms of Reference requested, we carefully considered whether any administrative or disciplinary action should be taken against any FBI personnel. Although we are critical of certain actions and omissions, we do not regard any of those actions to be misconduct that would warrant administrative or disciplinary action. We believe administrative or disciplinary action would be appropriate if FBI personnel violated known written policies or other binding directives, or if FBI personnel obstructed our investigation or were not honest about their actions. None of the missteps described in this Report involved such misconduct. Indeed, some missteps occurred because there was no stated policy or binding directive in place that would have required different actions. For example, we believe the Washington Field Office took an unreasonably long time to read and respond to San Diego's lead, but absent formal policy guidance on the assignment and resolution of Routine leads, the delay cannot be said to involve misconduct. We therefore cannot and do not recommend any administrative or disciplinary action against any FBI personnel.

If the formal policies that we recommend in Section A above are adopted and implemented, they will provide not only guidance to FBI personnel, but also clear standards by which future actions of FBI personnel may be assessed.

We are not in a position to say – and therefore express no view about – whether any administrative action should be taken for performance-based reasons (as distinguished from misconduct). Performance appraisals of this kind must be made on the basis of comprehensive criteria and information beyond the scope of our investigation.

INDEX OF ACRONYMS

ACS	Automated Case Support
ACS-ECF	Automated Case Support – Electronic Case File
ACS-ICM	Automated Case Support – Investigative Case Management
ACS-UNI	Automated Case Support – Universal Index
AD	Assistant Director
ADIC	Assistant Director in Charge
AG	Attorney General
AGG	Attorney General Guidelines
AGG-CHS	Attorney General’s Guidelines Regarding the Use of FBI Confidential Human Sources
AGG-Dom	Attorney General’s Guidelines for Domestic FBI Operations
AGG-Ext	Attorney General’s Guidelines on Extraterritorial FBI Operations
AGG-UCO	Attorney General’s Guidelines on FBI Undercover Operations
AOL	America OnLine
AOR	Area of Responsibility
ASAC	Assistant Special Agent in Charge
ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
AUSA	Assistant United States Attorney
CART	Computer Analysis and Response Team
CALEA	Communications Assistance for Law Enforcement Act
CD	Counterintelligence Division
CDC	Chief Division Counsel
C.F.R.	Code of Federal Regulations
CHS	Confidential Human Source
CIA	Central Intelligence Agency
CID	Criminal Investigative Division
CONUS	Continental United States
CPO	Corporate Policy Office
CPU	Central Processing Unit
CSO	Chief Security Officer
CT-1	Counterterrorism Squad 1
CT-3	Counterterrorism Squad 3
CTD	Counterterrorism Division
CUORC	Criminal Undercover Operations Review Committee
DAD	Deputy Assistant Director
DaLAS	Data Loading and Analysis System
D.C.	District of Columbia
DCIS	Defense Criminal Investigative Service
DCO	Division Compliance Officer
DEIDS	Defense Employee Interactive Data System
DI	Directorate of Intelligence
DIOG	Domestic Investigations Operations Guide

DIVS	Data Integration and Visualization System
DMX	Digital Media Exploration Unit
DNI	Director of National Intelligence
DoD	Department of Defense
DOJ	Department of Justice
DOS	Department of State
DWS	Data Warehouse System
DWS-EDMS	Data Warehouse System-Electronic Data Management System
EA	Emergency Authority
EAD	Executive Assistant Director
EC	Electronic Communication
ECAU	Electronic Communications Analysis Unit
ECF	Electronic Case File
ECPA	Electronic Communication Privacy Act
EDI	Electronic Discovery Institute
ELSUR	Electronic Surveillance
EO	Executive Order
FBI	Federal Bureau of Investigation
FBIHQ	FBI Headquarters
FBINET	FBI Network
FCC	Federal Communications Commission
FCRA	Fair Credit Report Act
FGUSO	Field Guide for Undercover and Sensitive Operations
FI	Foreign Intelligence
FI	Full Investigation
FICP	Foreign Intelligence Collection Program
FIG	Field Intelligence Group
FISA	Foreign Intelligence Surveillance Act
FISAMS	FISA Management System
FISC	Foreign Intelligence Surveillance Court
FTTTF	FBI Foreign Terrorist Tracking Task Force
GC	General Counsel
GUI	Graphic User Interface
HIMU	Human Intelligence Management Unit
HR	House of Representatives
HSC	Homeland Security Council
HSPD	Homeland Security Presidential Directive
HUMINT	Human Intelligence
IA	Intelligence Analyst
IAFIS	Integrated Automated Fingerprint Identification System
ICE	Bureau of Immigration and Customs Enforcement
ICM	Investigative Case Management
IDW	Investigative Data Warehouse
IIR	Intelligence Information Report
ILB	FBI Investigative Law Branch
IOB	Intelligence Oversight Board

IP	Internet Protocol
IT	International Terrorism
ITOS	International Terrorism Operations Section
JTOOC	Joint Terrorism Task Force Officer Orientation & Operations Course
JTTF	Joint Terrorism Task Force
LHM	Letterhead Memorandum
MAOP	FBI Manual of Administrative Operations and Procedures
MIOG	FBI Manual of Investigative Operations and Guidelines
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NCIS	Naval Criminal Investigation Service
NCTC	National Counterterrorism Center
NF	Distribution to non-US citizens is prohibited, regardless of their clearance or access permissions
NFIPM	National Foreign Intelligence Program Manual
NFPO	No Foreign Policy Objection
NHCD	National HUMINT Collection Directives
NIPF	National Intelligence Priorities Framework
NISS	National Information Sharing Strategy
NOFORN	Distribution to non-US citizens is prohibited, regardless of their clearance or access permissions
NJTTF	National Joint Terrorism Task Force
NSB	National Security Branch
NSC	National Security Council
NSD	National Security Division, DOJ
NSIG	Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection
NSL	National Security Letter
NSLB	National Security Law Branch
NSPD	National Security Presidential Directive
OC	Originator controls dissemination and/or release of the document
OGC	FBI Office of the General Counsel
OI	Office of Intelligence, DOJ NSD
OIC	FBI Office of Integrity and Compliance
OMB	Office of Management and Budget
OO	Office of Origin
ORCON	Originator controls dissemination and/or release of the document
PCLU	FBI Privacy and Civil Liberties Unit
PI	Preliminary Investigation
PG	Policy Implementation Guide
PIOB	FBI Potential Intelligence Oversight Board
P.L.	Public Law
RFPA	Right to Financial Privacy Act
RICO	Racketeer Influenced and Corrupt Organizations
S	Secret

SA	Special Agent
SAC	Special Agent in Charge
SAN	Storage Area Network
SCI	Sensitive Compartmentalized Information
SCION	Sensitive Compartmentalized Information Operational Network
SMP	Standard Minimization Procedure
SMS	Short Message Service (text messages)
SOG	FBI Special Operations Group
SORC	FBI Sensitive Operations Review Committee
SSA	Supervisory Special Agent
STAO	FBI Special Technologies & Applications Office
STAS	FBI Special Technologies & Applications Section
SWT	<i>Subhanahu wa ta'ala</i> (Arabic phrase meaning "Glory to God")
TCP/IP	Transmission Control Protocol/Internet Protocol
TICTU	FBI Telecommunications Intercept and Collection Technology Unit
TFO	Task Force Officer
TREC	Text Retrieval Conference
TS	Top Secret
TT	Trap and Trace
UC	Undercover
UCE	Undercover Employee
UCFN	FBI Universal Case File Number
UCRC	FBI Undercover Review Committee
UDP	Undisclosed Participation
UNI	FBI Universal Index
USAO	United States Attorney's Office
U.S.C.	United States Code
USIC	United States Intelligence Community
USMS	United States Marshals Service
USPER	US Person
VoIP	Voice Over Internet Protocol
WiFi	Limited range wireless communications network
WFO	Washington, D.C., Field Office
WRAMC	Walter Reed Army Medical Center

EXHIBIT 1

Letter dated August 6, 2010,

from

Laura W. Murphy, Director,
American Civil Liberties Union Washington Legislative Office
and
Anthony D. Romero, Executive Director,
American Civil Liberties Union

to

The Honorable William H. Webster

WASHINGTON
LEGISLATIVE OFFICE



August 6, 2010

The Honorable William H. Webster
Milbank, Tweed, Hadley & McCloy LLP
1850 K Street, NW
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Dear Judge Webster:

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ROBERT RENAR
TREASURER

On behalf of the American Civil Liberties Union (ACLU), we write to express our views on current domestic surveillance authorities for your consideration during your review of the incident at Fort Hood, Texas. This memorializes and expands upon conversations between our respective staffs. While we appreciate having the opportunity to engage in those conversations to express our strong concerns with existing surveillance authorities, we have had similar conversations with others in positions of authority over the last several years. We are particularly concerned that those authorities in most cases failed to address our concerns, while at the same time they also attempted to gain favorable treatment in some public spheres by claiming to have 'consulted' civil liberties groups. The Fort Hood killings were a tragic occurrence. But that tragedy must not be compounded by further eroding the privacy, due process, and speech rights of millions of wholly innocent Americans who are absolutely entitled to the full panoply of individual rights enumerated in our Constitution.

In our view, the expansions in the government's surveillance authorities over the last nine years already infringe on civil liberties and should not be amended to grant the government even more expansive powers. Over the past nine years, the government's domestic surveillance powers have changed dramatically. Suspicionless or mass surveillance has replaced the traditional model of surveillance narrowly targeted at those suspected of wrongdoing. Judicial oversight and discretion has been minimized. Since the attacks of September 11, the executive branch has asserted (or obtained from Congress) the authority for the dragnet collection and analysis of innocent Americans' telephone calls and e-mails, web browsing records, financial records, credit reports, and library records. Increasingly, the government is engaged in suspicionless data collection and surveillance that vacuums up and tracks sensitive information about innocent people. Even more disturbingly, as the government's surveillance powers have grown more intrusive and more powerful, the restrictions on many of those powers have been weakened or eliminated. And this surveillance often takes place in secret, with little or no oversight by the courts, by legislatures, or by the public. Instead of further reducing privacy protections in these laws, the government should amend them to require a nexus to suspected terrorist activity. This summary will examine constitutionally-suspect

powers and authorities in several laws and initiatives adopted in the post-9/11 years, including the USA PATRIOT Act, the Foreign Intelligence Surveillance Act Amendments Act of 2008, the Attorney General Guidelines, the FBI Domestic Investigations Operations Guide, Fusion Centers, Suspicious Activity Reporting, and the increased use of Administrative Subpoenas.

The USA PATRIOT Act

On October 26, 2001, former President Bush signed the Patriot Act into law. The Patriot Act vastly – and unconstitutionally – expanded the government’s authority to pry into people’s private lives with little or no evidence they were doing anything wrong. The expanded Patriot Act surveillance authorities unnecessarily and improperly infringe on Americans’ privacy, free speech, and associational rights. Worse, the Patriot Act authorizes the government to engage in increased domestic spying in secret with few, if any, protections built in to ensure these powers are not abused, and little opportunity for Congress to review whether the authorities it granted the executive branch actually made Americans any safer. We are concerned with many Patriot Act authorities, but will focus here on national security letters (NSLs) and three provisions due to expire on February 28, 2011. Our full report on the Patriot Act can be found at www.reformthepatriotact.org.

National security letters are secret letters through which the FBI can demand personal records about innocent customers from ISPs, financial institutions and credit companies without prior judicial approval or any requirement of suspicion. Through NSLs the FBI can demand sensitive information such as financial records, credit reports, telephone and e-mail communications records, and Internet-search activity. The NSL statutes also allow the FBI to impose non-disclosure or “gag orders” that prohibit NSL recipients from disclosing anything about the record demand.

The FBI’s NSL authority derives from separate statutes that were significantly expanded by section 505 of the Patriot Act.¹ Section 505 increased the number of officials who could authorize NSLs and reduced the standard necessary to obtain information with them. Before enactment of the Patriot Act, NSLs could be used only to obtain records about people suspected of wrongdoing. Now, the FBI can obtain sensitive customer records merely by certifying to itself that the records sought are “relevant” to an authorized counterterrorism or counter-intelligence investigation. Thus, the NSL statutes now allow the FBI (and some other executive branch agencies) to obtain records about people who are not known – or even suspected – to have done anything wrong. The Patriot Act reauthorization made the NSL provisions permanent.

The Department of Justice Inspector General (“IG”) has conducted a number of audits of the FBI’s use of the intrusive NSL record demand power. Each of these audits revealed FBI abuse and mismanagement of the NSL authority. The first two IG audits,

¹ The four NSL authorizing statutes include the Electronic Communications Privacy Act, 18 U.S.C. § 2709 (2000), the Right to Financial Privacy Act, 12 U.S.C. § 3401 (2000), the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2000), and the National Security Act of 1947, 50 U.S.C. § 436(a)(1)(2000).

covering NSLs and section 215 orders the FBI issued from 2003 through 2005, were released in March of 2007.² They confirmed widespread FBI mismanagement, misuse and abuse of these Patriot Act authorities, just as the ACLU had warned.³ The NSL audit revealed that the FBI so negligently managed its use of NSLs that it literally did not know how many NSLs it had issued. As a result, the FBI had seriously under-reported its use of NSLs in previous reports to Congress. The IG also found that FBI agents repeatedly ignored or confused the requirements of the NSL authorizing statutes and often used NSLs to collect private information against individuals two or three times removed from the subjects of FBI investigations. Twenty-two percent of the files the IG audited contained unreported legal violations.⁴ Finally, and most troubling, FBI supervisors used hundreds of illegal “exigent letters” to obtain telephone records without NSLs by falsely claiming emergencies.⁵

On March 13, 2008, the IG released a second pair of audit reports which covered 2006 and evaluated the reforms implemented by the DOJ and the FBI after the first audits were released in 2007.⁶ Not surprisingly, the new reports identified many of the same problems discovered in the earlier audits. The 2008 NSL report showed that the FBI issued 49,425 NSLs in 2006 (a 4.7 percent increase over 2005), and confirmed the FBI was increasingly using NSLs to gather information on U.S. persons (57 percent in 2006, up from 53 percent in 2005).⁷ The 2008 IG audit also revealed that high-ranking FBI officials, including an assistant director, a deputy assistant director, two acting deputy directors and a special agent in charge, improperly issued eleven “blanket NSLs” in 2006 seeking data on 3,860 telephone numbers.⁸ The IG reported that none of these “blanket NSLs” complied with FBI policy and eight imposed non-disclosure requirements on recipients that did not comply with the law.⁹ Moreover, it is clear from the IG report that the NSLs were written to “cover information already acquired through exigent letters and other informal responses.”¹⁰ The IG expressed concern that such high-ranking officials would fail to comply with FBI policies requiring FBI lawyers to review all NSLs, but it seems clear enough that this step was intentionally avoided because the officials knew

² See below for discussion of Section 215 orders.

³ DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS (Mar. 2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf> [hereinafter 2007 NSL Report]; DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), available at <http://www.usdoj.gov/oig/special/s0703a/final.pdf> [hereinafter 2007 Section 215 Report].

⁴ 2007 NSL Report, *supra* note 3, at 84.

⁵ 2007 NSL Report, *supra* note 3, at 86-99.

⁶ DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI’S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (Mar. 2008), available at <http://www.usdoj.gov/oig/special/s0803b/final.pdf> [hereinafter 2008 NSL Report]; DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI’S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006 (Mar. 2008), available at <http://www.usdoj.gov/oig/special/s0803a/final.pdf> [hereinafter 2008 Section 215 Report].

⁷ 2008 NSL Report, *supra* note 6, at 9.

⁸ 2008 NSL Report, *supra* note 6, at 127, 129 n.116.

⁹ 2008 NSL Report, *supra* note 6, at 127.

¹⁰ 2008 NSL Report, *supra* note 6, at 127.

these NSL requests were illegal.¹¹ It would be difficult to call this conduct anything but intentional. In the face of such abuses, and in consideration of the ever expanding collection of sensitive records, the NSL statutes should be amended to limit the FBI's authority to issue NSLs only where the person whose records are sought is a suspected terrorist, and to issue exigent letters only when harm is imminent and compliance with the NSL process would cause undue delay.

National security letter gag orders. The ACLU challenged the constitutionality of NSL gag orders in three cases. In one of these cases, *Doe v. Holder*, the ACLU twice has successfully challenged the constitutionality of the non-disclosure provisions of the NSL statute itself. In 2004, a district court judge ruled that the NSL statute's automatic gag provisions violated the First Amendment. In response to that ruling, Congress amended the NSL statute, remedying some problems but worsening others. In particular, the NSL statute's gag provisions remained unconstitutional and the ACLU continued to challenge the amended provisions in Court. In December 2008, the U.S. Court of Appeals for the Second Circuit ruled that parts of the revised NSL statute's gag provisions were unconstitutional. Specifically, the court ruled unconstitutional the sections that wrongly placed the burden on NSL recipients to challenge gag orders, that narrowly limited judicial review of gag orders, and that required courts to defer entirely to the executive branch. Congress must amend the non-disclosure statute to require the government to demonstrate that national security would be harmed in the absence of the gag and ensure that the gag automatically expires when that threat no longer exists.

Section 206 of the Patriot Act authorizes the government to obtain "John Doe roving wiretap" orders from the Foreign Intelligence Surveillance Court (FISC) that do not identify either the communications device to be tapped nor the individual against whom the surveillance is directed.¹² While the provision requires the target to be described "with particularity," and the FBI to file an after-the-fact report to the FISC to explain why the government believed the target was using the phones it was tapping, it vests government agents with an inappropriate level of discretion reminiscent of the general warrants that so angered American colonists prior to our country's founding. There is little public information available regarding how the government uses section 206. It should be amended to reflect the criminal standard to require the order to identify either the device or individual being tapped.

Section 6001 of the Intelligence Reform and Terrorism Prevention Act, which is known as the "lone wolf" provision, authorizes the government to obtain secret FISA surveillance orders against non-U.S. persons¹³ who are not even believed to be connected to any international terrorist group or foreign nation.¹⁴ The government justified this provision by imagining a hypothetical "lone wolf," an international terrorist operating independently of any terrorist organization, but there is little evidence to suggest this imaginary possibility was a real problem. As of the fall of 2009, this authority has never

¹¹ 2008 NSL Report, *supra* note 6, at 130.

¹² 50 U.S.C. §§ 1804-05.

¹³ 50 U.S.C. § 1801(i).

¹⁴ 50 U.S.C. § 1801(b)(1)(C).

been used.¹⁵ However, since terrorism is a crime, there is no reason to believe that the government could not obtain a Title III surveillance order from a criminal court if the government had probable cause to believe such an individual was planning an act of terrorism. Quite simply, this provision allows the government to avoid the more exacting standards and heightened accountability associated with obtaining electronic surveillance orders from criminal courts. The lone wolf authority should be repealed.

Section 215 of the Patriot Act is a sweeping grant of authority that gives the government the power to obtain secret FISC orders demanding “any tangible thing” from anyone and about anyone it claims is relevant to an authorized investigation regarding international terrorism or espionage. Known as the “library records provision,” section 215 significantly expands the types of items the government can demand and obtain under FISA, and lowers the standard of proof necessary to obtain an order from the FISC. Until the enactment of the Patriot Act, the government was required to show probable cause to believe the target of a demand was an agent of a foreign power. Section 215 of the Patriot Act lowered that standard significantly. Now the government only needs to state that the items sought are relevant to an authorized investigation. Indeed, the FBI no longer even needs to show that the items sought pertain to a person the FBI is investigating. Thus, under section 215, the government can obtain orders to obtain private records or items belonging to people – including U.S. citizens and residents – who are not even under suspicion of involvement with terrorism or espionage. Although some government officials have complained that the 215 process is already too onerous, an IG investigation found that the delays in obtaining information were the result of unfamiliarity with the proper process, simple misrouting of the section 215 requests, and an unnecessarily bureaucratic, self-imposed, multi-layered review process.¹⁶ To prevent the collection of wholly innocent information, this provision should be limited to collection of information on agents of foreign powers.

Foreign Intelligence Surveillance Act Amendments Act of 2008 (FAA)

The FISA Amendments Act (FAA) permits the executive branch to engage in dragnet surveillance of Americans’ international telephone calls and e-mails without a warrant, without suspicion of any kind, and with only very limited judicial oversight.¹⁷ Its most important limiting factor, that the “targets” of FAA surveillance must be people reasonably believed to be overseas, is of little comfort to the Americans who are on the other end of those communications. Americans do not lose their privacy and free speech rights just because they communicate with people abroad.

The FAA requires only minimal court oversight of this spying authority. In assessing an FAA surveillance application, the FISC reviews only the government’s proposed, general procedures for targeting and minimizing the use of information that is

¹⁵ *Reauthorizing the USA PATRIOT Act: Ensuring Liberty and Security Before the Senate Comm on the Judiciary*, 110th Cong (2009) (statement of David Kris, Assistant Attorney General) available at <http://judiciary.senate.gov/pdf/09-09-23%20Kris%20Testimony.pdf>

¹⁶ 2008 Section 215 Report, *supra* note 6, at 45-47.

¹⁷ 50 U.S.C. § 1881-1881f.

collected. The Act does not require the government to demonstrate to the FISC that its surveillance targets are foreign agents, that they are engaged in criminal activity, or that they are connected even remotely with terrorism. Indeed, the statute does not require the government to identify its surveillance targets at all. Moreover, the statute expressly provides that the government's certification is not required to identify the facilities, telephone lines, e-mail addresses, places, premises, or property at which its surveillance will be directed.

Thus, the government may obtain an FAA surveillance order without identifying the people (or even the group of people) to be surveilled; without specifying the facilities, places, premises, or property to be monitored; without specifying the particular communications to be collected; without obtaining individualized warrants based on criminal or foreign intelligence probable cause; and without making even a prior administrative determination that the acquisition relates to a particular foreign agent or foreign power. An FAA surveillance order is intended to be a kind of blank check, which once obtained will suffice to cover – without further judicial authorization – whatever surveillance the government may choose to initiate, within broadly drawn parameters, for a period of up to one year. Thus, the court may not know who, what, or where the government will actually tap, thereby undercutting any meaningful role for the court and violating the Fourth Amendment. A single FAA order may be used to justify the surveillance of communications implicating thousands or even millions of U.S. citizens and residents.

The FAA does contain a general ban on reverse targeting, the practice of continuing a wiretap on a person overseas as a pretext for listening in on a U.S. target. However, it lacks stronger language contained in prior House legislation that required clear statutory directives about when the government should return to the FISA court to obtain an individualized order to continue listening to a U.S. person's communications. The trigger for individualized probable cause warrants is instead negotiated between the administration and the secret FISA court.

The FISA Amendments Act should be repealed. The Fourth Amendment requires issuance of warrants to conduct a wiretap of Americans' communications. The Fourth Amendment also requires those warrants to describe with particularity the persons or places to be tapped. Moreover, surveillance authorities, in order to be deemed reasonable under the Fourth Amendment, must have "precise and discriminate" requirements that "carefully circumscribed" the government's spying power "so as to prevent unauthorized invasions of privacy."¹⁸ While we support amendments that would reduce the collection of innocent U.S. communications and information, such as banning bulk collection programs or strict minimization requirements, any collection under this program is unconstitutional. The ACLU is challenging this law in court.¹⁹

¹⁸ *Berger v. New York*, 388 U.S. 41, 57-58 (1967)

¹⁹ *Amnesty v. Blair* Complaints, motions and declarations available at <http://www.aclu.org/national-security/amnesty-et-al-v-blair>.

Attorney General Guidelines

After the revelation of widespread spying on Americans in the 1970s, the Senate convened the Church Committee to investigate government practices and make recommendations about reining them in. Exposure of the FBI's COINTELPRO program, led to a series of reforms, including laws designed to regulate government surveillance and internal guidelines, now referred to as the Attorney General's Guidelines, which limited the FBI's investigative authority and spelled out the rules governing law enforcement operations. The most recent and dramatic changes to the AG Guidelines were made in December 2008, in the Bush Administration's final month in office.²⁰ Then-Attorney General Michael Mukasey instituted new guidelines that authorize the FBI to conduct investigations, called "assessments", without requiring any factual predicate suggesting the involvement of the target of the investigation in illegal activity or threats to national security. The Supreme Court established "reasonable suspicion" as the standard for police stops in *Terry v Ohio* in 1968. This standard required suspicion supported by articulable facts suggesting criminal activity was afoot before a policeman could stop a person for investigative purposes. Likewise, the Department of Justice established a reasonable suspicion standard for the inclusion of personally identifiable information into criminal intelligence systems. The Mukasey guidelines, however, allow the FBI to utilize a number of intrusive investigative techniques during these assessments, including physical surveillance, retrieving data from commercial databases, recruiting and tasking informants to attend meetings under false pretenses, and engaging in "pretext" interviews in which FBI agents misrepresent their identities in order to elicit information. "Assessments" can even be conducted against an individual simply to determine if he or she would be a suitable FBI informant. Nothing in the new AG Guidelines protects entirely innocent Americans from being thoroughly investigated by the FBI for no good reason. The new Guidelines explicitly authorize the surveillance and infiltration of peaceful advocacy groups in advance of demonstrations, and they do not clearly prohibit using race, religion, or national origin as factors in initiating assessments.

Innocence no longer protects ordinary Americans from being subjected to a wide range of intrusive investigative techniques such as collecting information from online sources, including commercial databases, recruiting and tasking informants to gather information, using FBI agents to gather information surreptitiously from someone without revealing their true identity or true purpose for asking questions, and having FBI agents follow them day and night for as long as they want. The new guidelines also open the door to racial profiling. They "do not authorize any conduct prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," but that policy included an exemption for national security and border integrity investigations.²¹

²⁰ DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC OPERATIONS, DEPARTMENT OF JUSTICE, *available at* <http://www.justice.gov/ag/readingroom/guidelines.pdf>, *see also* ACLU, Fact Sheet -Attorney General Guidelines, Oct 8, 2008, *available at* <http://www.aclu.org/national-security/fact-sheet-new-attorney-general-guidelines>

²¹ U S DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), *available at*

By erasing the line between criminal investigations and national security investigations, the guidelines open the door to racial profiling. The Guidelines should be amended to require a factual predicate before investigations are started, a complete ban on racial profiling, and stronger protections for First Amendment protected activity.

Federal Bureau of Investigation Domestic Investigations Operations Guide (DIOG)

An internal FBI guide to implementing the new AG Guidelines, called the Domestic Investigations and Operations Guide (DIOG),²² contains startling revelations about how the FBI is using race and ethnicity in conducting assessments and investigations. Instead of further limiting the use of race in investigations, it expounds the many ways that it can be incorporated into suspicionless surveillance and information collection. First, the DIOG says that investigative and intelligence collection activities must not be based "solely on race." But the Department of Justice's 2003 Guidance on the Use of Race in Federal Law Enforcement,²³ which is binding on the FBI, says race can't be used "to any degree" absent a specific subject description. This appears to subvert the more exacting limitation.

Moreover, the DIOG describes the authorized uses of race and ethnicity for FBI agents, which include "collecting and analyzing" racial and ethnic community demographics,²⁴ and collecting "specific and relevant" racial and ethnic behavior. Though the DIOG prohibits "the collection of cultural and behavioral information about an ethnic community that bears no relationship to a valid investigative or analytical need," it allows FBI agents to consider "focused behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community," as well as "behavioral and cultural information about ethnic or racial communities" that may be exploited by criminals or terrorists "who hide within those communities."²⁵ The DIOG grants the FBI far too much authority to target racial, ethnic and religious minorities for unwarranted surveillance. The DIOG should be amended to require a factual predicate before information is collected and a meaningful ban on racial profiling.

Fusion Centers

In November 2007, the ACLU issued its first report on fusion centers, rapidly developing multi-jurisdictional intelligence centers designed to organize local domestic information collection activities into an integrated system that can distribute data both horizontally across a network of fusion centers and vertically, down to local law enforcement and up to the federal intelligence community.²⁶ With at least 72 around the

http://www.justice.gov/crt/split/documents/guidance_on_race.php [hereinafter DOJ Use of Race Guidance].

²² FEDERAL BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATION OPERATIONS GUIDE, *available at* http://www.muslimadvocates.org/DIOGs_Chapter4.pdf [hereinafter DIOG].

²³ DOJ Use of Race Guidance, *supra*, note 21.

²⁴ DIOG, *supra* note 22, at 32.

²⁵ DIOG, *supra* note 22, 33-34.

²⁶ ACLU, What's Wrong With Fusion Centers? (Dec. 2007), *available at* http://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf.

country, these centers can employ officials from federal, state and local law enforcement and homeland security agencies, as well as other state and local government entities, the federal intelligence community, the military and even private companies, to spy on Americans in virtually complete secrecy. We have recently compiled a website to track known instances of abuse by some of these centers. Information about fusion center spying and the related local, state and federal agencies involved can be found at www.aclu.org/spy-files.

While fusion centers vary widely in what they do, overarching problems with these domestic intelligence operations put Americans' privacy and civil liberties at risk. First, in a multi-jurisdictional environment with ambiguous lines of authority, it is unclear what rules apply and which agency is ultimately responsible for the activities of the fusion center participants. Second, some fusion centers incorporate private sector and military participation, thereby threatening the integrity of current privacy laws and risking the violation of the prohibition on military activity on U.S. soil. Third, federal fusion center guidelines encourage wholesale data collection and data manipulation processes that threaten privacy. And finally, fusion centers are characterized by excessive secrecy which limits public oversight and accountability. Moreover, the over-classification of national security information limits its distribution to and from the fusion centers, impairing their ability to acquire essential information and impeding their ability to fulfill their stated mission of sharing information with all appropriate stakeholders, including the public. Excessive secrecy cripples fusion centers' ability to effectively share information, bringing their ultimate value into doubt."

A number of troubling fusion center intelligence products have leaked to the public. In one, a Texas fusion center intelligence bulletin described a purported conspiracy between Muslim civil rights organizations, lobbying groups, the anti-war movement, a former U.S. Congresswoman, the U.S. Treasury Department and hip hop bands to spread Sharia law in the U.S.²⁷ In another, a Missouri Fusion Center released a report on "the modern militia movement" that claimed militia members are "usually supporters" of third-party presidential candidates like Ron Paul and Bob Barr.²⁸ Also, a March 2008 Virginia Fusion Center terrorism threat assessment described the state's universities and colleges as "nodes for radicalization" and characterized the "diversity" surrounding a Virginia military base and the state's "historically black" colleges as possible threats. Finally, a Washington fusion center reported on protesters on both sides of the abortion debate, despite the fact that no violence was expected.²⁹ These bulletins, which are widely distributed, would be laughable except that they come with the imprimatur of a federally backed intelligence operation, and they reflect a status quo that apparently condones and encourages law enforcement officers to monitor the activities of political activists and racial and religious minorities. There is some good news, however.

²⁷ TEXAS FUSION CENTER SYSTEM, PREVENTION AWARENESS BULLETIN (Feb 19, 2009), available at http://www.privacylives.com/wp-content/uploads/2009/03/texasfusion_021909.pdf.

²⁸ MISSOURI INFORMATION ANALYSIS CENTER, THE MODERN MILITIA MOVEMENT (Feb 20, 2009), available at www.infowars.com.

²⁹ Ryan J. Foley, Associated Press, *Homeland Security Collected Information on Wisconsin Abortion, Pro-Life Activist*, AP, Feb 8, 2010.

The 2010 DHS Homeland Security Grant Program established a requirement³⁰ that fusion centers certify that privacy and civil liberties protections are in place in order to use DHS grant funds. This is the first time DHS has acknowledged its authority to regulate fusion center activities and it coincides with the establishment of a new DHS Joint Fusion Center Program Management Office to oversee DHS support to fusion centers.³¹ While these are only small steps, they are important advances toward establishing an effective governance and oversight structure for fusion centers. Many fusion centers have also made efforts to address our concern about excessive secrecy surrounding their activities by engaging with local privacy and civil liberties groups, and arranging tours and/or public meetings within their communities. Several fusion centers have sought feedback from privacy and civil liberties groups as they develop their privacy policies. These are welcome opportunities for members of the public to learn about fusion center activities and for fusion center personnel to hear, understand and address public concerns. Finally, the Naval Postgraduate School Center for Homeland Defense and Security initiated a Fusion Center Leaders Program that may help to train, standardize and professionalize fusion center staff.

Suspicious Activity Reporting

Over the last few years, federal, state and local authorities have initiated “suspicious activity reporting” (SAR) programs to encourage law enforcement officers, intelligence and homeland security officials, emergency responders, and even the public to report the “suspicious” activities of their neighbors to law enforcement and intelligence agencies.³² Law enforcement agencies have long collected information about their routine interactions with members of the public. Sometimes called “field interrogation reports” or “stop and frisk” records, this documentation, on the one hand, provides a measure of accountability over police activity. But it also creates an opportunity for police to collect the personal data of innocent people and put it into criminal intelligence files with little or no evidence of wrongdoing. As police records increasingly become automated, law enforcement and intelligence agencies are increasingly seeking to mine this routine contact information and distribute it broadly, as if it is criminal intelligence information. These SARs programs have aggressively expanded these efforts in the name of national security.

The problem is that many of the behaviors these SAR programs identify as precursors to terrorism include innocuous and commonplace activities such as using

³⁰ DHS/DOJ FUSION PROCESS TECHNICAL ASSISTANCE PROGRAMS AND SERVICES, FACT SHEET: ENHANCING THE PRIVACY, CIVIL RIGHTS AND CIVIL LIBERTIES FRAMEWORK FOR STATE AND MAJOR URBAN AREA FUSION CENTERS, *available at*

http://nsi.ncirc.gov/documents/FS_Enhancing_the_Privacy_for_State_and_Major_Urban_Area_FCs.pdf

³¹ *Office of Intelligence and Analysis' Vision and Goals Hearing Before House Committee on Homeland Security*, 110th Cong. (2010) (statement of Caryn Wagner, Under Secretary and Chief Intelligence Officer, Dep't of Homeland Security, and Bart Johnson, Principal Deputy Under Secretary, Dep't of Homeland Security).

³² MARK A. RANDOL, CONGRESSIONAL RESEARCH SERVICE, TERRORISM INFORMATION SHARING AND THE NATIONWIDE SUSPICIOUS ACTIVITY REPORT INITIATIVE: BACKGROUND AND ISSUES FOR CONGRESS (Nov. 5, 2009).

binoculars, taking pictures, drawing diagrams, and taking notes.³³ SAR programs increase the probability that innocent people will be stopped by police and have their personal information collected for inclusion in law enforcement and intelligence databases. They also open the door to racial profiling and other improper police practices by giving police unwarranted discretion to stop people who are not reasonably suspected of wrongdoing. With new intelligence sharing systems like fusion centers, Joint Terrorism Task Forces, and the Director of National Intelligence (DNI) Information Sharing Environment (ISE), information collected by local police in any city or small town in America can now quickly end up in federal intelligence databases.

In January 2008 the DNI ISE program manager published functional standards for state and local law enforcement officers to report 'suspicious' activities to fusion centers and to the federal intelligence community through the ISE. The ACLU released a report criticizing these programs and in response, ISE program manager Thomas E. McNamara and his office worked with the ACLU and other privacy and civil liberties groups, as well as the LAPD and other federal, state and local law enforcement agencies, to revise the ISE SAR functional standard to address privacy and civil liberties concerns.

The revised ISE guidelines for suspicious activity reporting, issued in May 2009, establish that a reasonable connection to terrorism or other criminal activity is required before law enforcement officers may collect Americans' personal information and share it within the ISE. It affirms that all constitutional standards applicable to ordinary criminal investigations, such as the Terry reasonable suspicion test, also apply to SAR inquiries.³⁴ The revised ISE functional standards also make clear that behaviors such as photography and eliciting information are protected under the First Amendment, and require additional facts and circumstances giving reason to believe the behavior is related to crime or terrorism before reporting is appropriate.³⁵ These changes to the standard, which include reiterating that race, ethnicity and religion cannot be used as factors that create suspicion,³⁶ give law enforcement all the authority it needs while showing greater respect for individuals' privacy and civil liberties. We applaud the willingness of the ISE Program Manager to engage constructively with the civil liberties community and to make significant modifications to the functional standard to address the concerns presented. However, ISE is one of only many SAR collection programs across the country. It is critical that operations at the state and local level and those conducted by other federal agencies adopt similar policies to reduce inappropriate law enforcement contact with completely innocent Americans.

³³ Mike German and Jay Stanley, ACLU, Fusion Center Update (July 2008), *available at* http://www.aclu.org/files/pdfs/privacy/fusion_update_20080729.pdf.

³⁴ INFORMATION SHARING ENVIRONMENT (ISE) FUNCTIONAL STANDARD (FS) SUSPICIOUS ACTIVITY REPORTING (SAR) VERSION 1.5, at 7, *available at* http://www.ise.gov/docs/ctiss/ISE-FS-200_ISE-SAR_Functional_Standard_V1.5_Issued_2009.pdf [hereinafter ISE Standards].

³⁵ ISE Standards, *supra* note 34 at 29.

³⁶ ISE Standards, *supra* note 34 at 7, 29.

Possible Expansions of Government Authority: Administrative Subpoenas

Your staff asked us to share our opinion on the expansion of the current national security letter authority to create a general administrative subpoena for national security purposes. As discussed above, we believe that the government is already abusing its NSL authority to collect data on those who are not suspected of any wrongdoing. Expanding the NSL authority to compel the production of any tangible thing or any type of record will only exponentially increase the amount of innocent and irrelevant information in the government's hands and violate the privacy of countless additional people.

Compulsory government demands for information have a number of limiting factors: who issues the demand, the scope of the information obtained, and on what showing the government must make to obtain it. An administrative subpoena would incorporate the lowest possible standard in all of these categories to create a powerful tool that is void of prior judicial authorization, is limitless in its application, and as proposed by a number of sources, would permit collection information on wholly innocent people as long as it is deemed "relevant."

The government has other tools at its disposal and does not need to expand its administrative subpoena capacity. It can obtain a subpoena in a criminal terrorism investigation or apply to the FISC for an order for any tangible thing. It can also use FAA programmatic orders to collect information if those programs are targeted at people believed to be overseas. No one has claimed that these tools are ineffective in obtaining information – only that the required processes are administratively burdensome. Those processes, however, are the only checks on incredibly powerful surveillance authorities that operate in almost complete secrecy and have been shown to be subject to abuse. We should not be looking to expand the opportunity for abuse, but rather to instill discipline and integrity into the process while allowing investigators to do their work in a constitutional manner.

Some also argue that because a small handful of agencies and U.S. Attorneys have criminal subpoena power,³⁷ the FBI or the intelligence community should have the intelligence equivalent. That others have this power is not germane to the debate of whether our government should create another powerful, intrusive tool to obtain sensitive and personal information. On the other hand, it is germane to consider whether any such authority respects the constitutional rights of those it impacts.

Nearly all agency subpoenas are used for traditional administrative purposes, and only a few are intended to be used as criminal investigative tools.³⁸ These are designed for very narrow special needs cases, yet a foreign intelligence subpoena would be expansive, purposely including information wholly unrelated to suspected wrongdoing.

³⁷ See CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, ADMINISTRATIVE SUBPOENAS AND NATIONAL SECURITY LETTERS IN CRIMINAL AND FOREIGN INTELLIGENCE INVESTIGATIONS: BACKGROUND AND PROPOSED ADJUSTMENTS, April 15, 2005 (review of federal administrative subpoenas).

³⁸ *Id.* at 13-18.

Foreign intelligence investigations are fundamentally different from other traditional administrative proceedings in that they are cloaked in secrecy and the information obtained in them is retained, data mined, disseminated or made accessible to countless federal, state and local law enforcement and intelligence staff, and used in undisclosed ways. A new subpoena power would be wholly different from its criminal or administrative counterpart as it would lack many of the limitations and protections that the latter offer.³⁹ Grand jury subpoenas are also significantly different from recent subpoena power proposals.⁴⁰ The grand jury is an ancient authority and its independence from the prosecution is well settled. Grand jurors are ordinary citizens tasked with finding probable cause of a crime and to operate as a check on the executive branch, and federal prosecutors are bound by a professional code of ethics. None of these protections would be present in an intelligence subpoena.

Conclusion

We appreciate your soliciting our thoughts on current national security surveillance authorities. The government has expansive powers that are routinely abused to collect information on innocent people in violation of their civil liberties. We hope that your review will conclude that these authorities need to be curtailed to comport with the Constitution and should in no way be expanded. We remain available to discuss in more detail these and any other authorities you are reviewing.

Sincerely,



Laura W. Murphy
Director, ACLU Washington Legislative Office



Anthony D. Romero
Executive Director, ACLU

Cc: Director Robert S. Mueller, Federal Bureau of Investigation
General Counsel Valerie Caproni, Federal Bureau of Investigation
Mr. Adrian Steel, Mayer Brown

³⁹ For a more complete discussion on a previous subpoena proposal, see ACLU, *Why FBI Intelligence Subpoenas Threaten Civil Liberties*, June 28, 2005, available at <http://www.aclu.org/national-security/why-fbi-intelligence-subpoenas-threaten-civil-liberties>

⁴⁰ *Id.*, Coalition Letter to the Select Senate Intelligence Committee, opposing national security subpoenas, May 23, 2005, available at <http://www.aclu.org/national-security/coalition-letter-senators-roberts-and-rockefeller-opposing-administrative-subpoena>

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